TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1967

No. [redacted] 29

SANFORD ZWICKLER, APPELLANT,

vs.

AARON E. KOOTA, AS DISTRICT ATTORNEY OF THE COUNTY OF KINGS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

FILED NOVEMBER 30, 1966

PROBABLE JURISDICTION NOTED FEBRUARY 13, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 810

SANFORD ZWICKLER, APPELLANT,

vs.

AARON E. KOOTA, AS DISTRICT ATTORNEY OF THE COUNTY OF KINGS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action File No. 66C 375

SANFORD ZWICKLER, Plaintiff,

—against—

AARON E. KOOTA, as District Attorney of the County of Kings, Defendant.

SUMMONS RETURNED AND FILED—April 26, 1966

To the above named Defendant:

You are hereby summoned and required to serve upon Emanuel Redfield, plaintiff's attorney, whose address 60 Wall Street, New York 5, New York, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Lewis Orgel, Clerk of the Court, By James R. Abram, Deputy Clerk.

Date: April 22, 1966.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[File endorsement omitted]

[fol. 2]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

66-C-375

[Title omitted]

AMENDED COMPLAINT—Filed May 3, 1966

The plaintiff, by his attorney, Emanuel Redfield, for his Amended Complaint, respectfully alleges:

First: The action arises under 28 U.S.C.A. Section 1343(4) and 28 U.S.C.A. Section 2201, as hereinafter more fully appears.

Second: The plaintiff at all times hereinafter mentioned was and still is a resident of the Borough of Brooklyn, City and State of New York.

Third: That at all times hereinafter mentioned, the plaintiff was and still is a citizen of the State of New York and of the United States of America.

Fourth: The defendant Aaron E. Koota at all times hereinafter mentioned, was and still is the District Attorney of the County of Kings, State of New York.

Fifth: On or about October 29, 1964, a prosecution was commenced against the plaintiff herein by the defendant herein in which plaintiff was charged with having violated Section 781-b of the Penal Law of New York, in that on that day the plaintiff distributed in the Borough of Brooklyn, City of New York, a quantity of a leaflet, a copy of which [fol. 3] is hereto annexed as Exhibit I, without containing the name and address of the printer or sponsor of said leaflet.

Sixth: The said leaflet referred to the Democratic candidate for the Congress of the United States at an election to be held on November 3, 1964, or about four days after the date of the said distribution.

[File endorsement omitted]

Seventh: At a trial held on December 11, 1964 in the Criminal Court of the City of New York, County of Kings, the defendant herein produced witnesses on behalf of the People of the State of New York and moved the court for judgment on behalf of the People of the State of New York.

Eighth: At the same trial the plaintiff herein moved for a dismissal of the charge on the ground that the aforesaid statute upon which the prosecution was premised, is unconstitutional in that it violated the Fourteenth Amendment to the Constitution of the United States.

Ninth: The said court overruled the contentions of plaintiff and on February 10, 1965 found plaintiff guilty of having violated said statute.

Tenth: Thereafter the plaintiff perfected an appeal to the Appellate Term of the Supreme Court of the State of New York for the Second Judicial Department.

Eleventh: The said Appellate Term by order dated and entered the 23rd day of April, 1965 reversed the said conviction solely on the ground that there was no adequate proof that the plaintiff had distributed the leaflet "in quantity".

[fol. 4] *Twelfth*: On June 25, 1965 permission was granted to the People of the State of New York to appeal to the Court of Appeals, and the People thereafter perfected such appeal.

Thirteenth: On December 1, 1965 the Court of Appeals unanimously and without opinion or memorandum affirmed the order of the Appellate Term.

Fourteenth: The plaintiff desires and intends to distribute in the Borough of Brooklyn, County of Kings, New York, at the place where he had previously done so and at various places in said County, the anonymous leaflet herein described as Exhibit I and similar anonymous leaflets, all prepared by and at the instance of a person other than the plaintiff. The said distribution is intended to be made at

any time during the election campaign of 1966 and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966. Such distribution is intended to be made in quantities of more than a thousand copies of such anonymous leaflet.

Fifteenth: Upon information and belief, the person referred to in said leaflet is the present incumbent and will become a candidate in 1966 for reelection to the Congress of the United States and has been a political figure and public official for many years last past.

Sixteenth: Plaintiff intends to distribute said leaflet and similar leaflets anonymously because of his belief and claim that the statute in forbidding the distribution of anonymous [fol. 5] literature of the nature described is unconstitutional in violation of the First and Fourteenth Amendments to the Constitution of the United States, in that it is an infringement of the freedom of expression, and that until the statute is declared constitutional, plaintiff will persist in his claim of the right to make such distribution.

Seventeenth: The said leaflet is embraced within the scope and intendment of the statute.

Eighteenth: The defendant, Aaron E. Koota, previously prosecuted plaintiff and is a diligent and conscientious public officer and pursuant to his duties intends or will again prosecute the plaintiff for his acts of distribution as aforesaid.

Nineteenth: Because of the previous prosecution of plaintiff for making the distribution of the leaflet, as aforesaid, and because of the threat of prosecution of him, plaintiff is in fear of exercising his right to make distribution as aforesaid and is in danger of again being prosecuted therefor, unless his right of expression is declared by this court, without submitting himself to the penalties of the statute.

Wherefore, plaintiff demands judgment:

1. Declaring that Section 781-b of the Penal Law of New York is unconstitutional in that it infringes upon the rights of the plaintiff under the First and Fourteenth Amendments to the Constitution of the United States;

2. Enjoining the defendant, his agents and assistants from prosecuting the plaintiff because of the matters al-
[fol. 6] leged in this complaint;

3. Granting the plaintiff an injunction pending the determination of this action;

4. Directing that this action and all proceedings thereunder be heard before a three-judge court pursuant to Section 2281, U.S.C.A.;

5. Such other and further relief as to the court may seem just.

Emanuel Redfield, Attorney for Plaintiff, Office & P. O. Address, 60 Wall Street, New York 5, New York, HAnover 2-1023.

[fol. 7]

EXHIBIT I TO AMENDED COMPLAINT

REPRESENTATIVE MULTER—
EXPLAIN YOUR POSITIONS

AID TO NASSER

On September 2, 1964, an amendment was proposed to a foreign aid bill (Public Law 480). In substance, it would have cut off all aid to the United Arab Republic. Congressman Multer spoke at length against the amendment, and in his own words, urged its defeat "as earnestly as I can". He stated that his position was based on "humanitarian instinct". (Congressional Record 20792).

In this respect, the following should be noted

(a) Congressman Multer's stand permits the diversion of funds by Dictator Nasser to his armaments buildup.

(b) The United Arab Republic is also a recipient of aid from Communist Russia.

(c) Egypt is now employing the technical skills of scientists, formerly under the employ of the Nazis.

(d) Congressman Multer debated against the amendment on the eve of the summit conference held in Cairo by 13 Arab States which are threatening the peace of the Near East and the State of Israel in particular.

SOVIET ANTI-SEMITISM

The 1964 Foreign Aid bill was passed in the United States Senate with an amendment sponsored by Senator Abraham Ribicoff (D., Conn.) that strongly condemned the anti-Semitic practices of the Soviet Union. When this issue was brought to the House-Senate conferees, a much more general statement decrying all types of religious bigotry was adopted.

Representative Multer praised this "watered down" measure on the House floor, and stated:

"While the Senate version did point the finger directly at Soviet Russia, the version as finally adopted, I think, is much the better one."

"I believe, instead of pointing the finger at the culprit now before the bar of world public opinion where it is being so severly condemned, it is much better that this Congress go on record as it is doing now, against religious persecution wherever it may raise its ugly head." (Congressional Record 22850).

WHY MR. MULTER, WHY ? ? ? ? ?

[fol. 8] *Duly sworn to by Sanford Zwickler, jurat omitted in printing.*

[fol. 9] Affidavit of Service by Mail (omitted in printing).

[fol. 10]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

66-C-375

[Title omitted]

PLAINTIFF'S NOTICE OF AND MOTION FOR TEMPORARY INJUNCTION AND TO CONVENE THREE-JUDGE COURT—Filed May 3, 1966

SIRS:

Please Take Notice that the undersigned pursuant to Rule 65 of the Rules of Civil Procedure, will move this court at a Motion Term in the Federal Building, Washington and Johnson Streets, Brooklyn, New York, on the 18th day of May, 1966 at 10:00 A.M. or as soon thereafter as counsel can be heard

1. For an order granting a preliminary injunction, in favor of plaintiff, enjoining the defendant from in anywise interfering with the distribution of the anonymous leaflet set forth in the amended complaint or similar ones;

The grounds of this motion are fully set forth in the amended complaint and are that:

(a). The statute under which the defendant is authorized to act, to wit, Section 781-b of the Penal Law of the State of New York is unconstitutional in violation of the First and Fourteenth Amendments to the Constitution of the United States in that:

(i) it operates as a prior restraint on freedom of speech and expression.

[fol. 11] (b) The enforcement of the said statute will cause immediate and irreparable injury to the plaintiff.

2. To convene for the purpose of hearing and determining this application for a preliminary injunction and this cause, a statutory court of three judges at least one of whom shall be a circuit judge, in accordance with the provisions of Section 2284, Title 28, United States Code;

3. Such other and further relief as to the court may seem just.

Dated: New York, New York, April 28, 1966.

Emanuel Redfield, Attorney for Plaintiff, Office & P. O. Address, 60 Wall Street, New York 5, New York, HAnover 2-1023.

To:

Aaron E. Koota, Esq., Municipal Building, Brooklyn, New York.

[fol. 12]

CLERK'S NOTE

Amended Complaint and Exhibit I thereto are omitted from the record here as they are printed at pages 2-6 supra.

[fol. 19] Affidavit of Service by Mail (omitted in printing).

[File endorsement omitted]

[fol. 20]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action File No. 375-1966

[Title omitted]

DEFENDANT'S NOTICE OF MOTION, PURSUANT TO RULE 12b (1)(6) F.R.C.P. TO DISMISS AMENDED COMPLAINT ON JURISDICTIONAL GROUNDS AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED—Filed May 4, 1966

SIR:

Please Take Notice that upon the amended complaint filed in this action and the annexed affidavit of Irving L. Rollins, sworn to the 3rd day of May, 1966, the undersigned will move this Court at a Term for Motions to be heard at the United States Courthouse in the Federal Building, 225 Washington Street, Borough of Brooklyn, City and State of New York on the 18th day of May, 1966 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order dismissing the amended complaint herein pursuant to Rule 12b (1)(6) of the Federal Rules of Civil Procedure on the grounds that (a) this Court lacks jurisdiction of the subject matter of said amended complaint; and (b) that such amended complaint in the absence of diversity of citizenship fails to state a claim within the original jurisdiction of the United States District Court upon which relief can be granted; and for such other and further relief as to the Court may seem just and proper.

[File endorsement omitted]

Dated: New York, New York, May 3, 1966.

Louis J. Lefkowitz, Attorney General of the State of New York, Attorney for Defendant, By Irving L. Rollins, Assistant Attorney General, 80 Centre Street, New York, New York 10013.

[fol. 21] To: Emanuel Redfield, Esq., Attorney for Plaintiff, 60 Wall Street, New York, New York 10005.

[fol. 22]

AFFIDAVIT—Filed May 4, 1966

Civil Action File No. 375-1966

State of New York,
County of New York, ss.:

Irving L. Rollins, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the office of Hon. Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the defendant herein. The facts hereinafter stated are based upon official record made available to me.

2. I submit this affidavit in support of the defendant's motion pursuant to Rule 12b (1)(6) of the Federal Rules of Civil Procedure to dismiss the amended complaint in the above entitled action on jurisdictional grounds and for failure to state a claim upon which relief can be granted.

3. That Section 781-b of the Penal Law of the State of New York which the plaintiff seeks by the subject action to declare unconstitutional as violative of the First and Fourteenth Amendments to the Constitution of the United [fol. 23] States by allegedly inhibiting the freedom of expression was last amended in its present provisions by Chapter 576 of the Laws of 1962 effective September 1, 1962. This amendment was effected by and as part of the program of Hon. Louis J. Lefkowitz, Attorney General of

the State of New York. As New York's Chief Law Enforcement Officer, he was empowered to investigate and prosecute cases arising under the Election Law and under the provisions of the Penal Law relating to crimes against the elected franchise (N.Y. Executive Law, §69). As the 1962 Legislative Annual shows, the Attorney General wrote the following memorandum to the New York Legislature with reference to such statute:

"*Printing of political literature* S.I. 1967, Pr. 4531, Conklin Ch. 576

Penal Law, §781-b. This is an amendment to the 'Printers Ink' law of the early nineteen hundreds. This law currently provides that either the name and address of the printer, or the name and address of the sponsor or person requesting the printing, be printed thereon. In practice, only the printer's name usually appears and the bill is generally ineffectual in dealing with faults or scurrilous campaign literature.

The proposed amendment would require the name and address of the person or group which caused the printing or reproduction of the literature to be printed thereon, in addition to the name and address of the actual printer.

In the 1961 democratic primary election in the city of New York, unusually violent and untruthful anonymous allegations and statements were widely printed and distributed. While in some instances the names of the individuals believed to be responsible were [fol. 24] traced out, responsibility could not be definitely determined.

It would seem any person or committee which reaches the public in writing regarding any person or program of a political nature should accept responsibility for the printed material and its accuracy or answer to any person hurt by any false statement so printed or reproduced.

This bill is part of the program of the Attorney General."

Irving L. Rollins, Assistant Attorney General.

Sworn to before me this 3rd day of May, 1966.

Charles A. LaTorella, Jr., Assistant Attorney General of the State of New York.

[fol. 25] Affidavit of Service (omitted in printing).

[fol. 26]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

66-C-375

SANFORD ZWICKLER, Plaintiff,

—against—

AARON E. KOOTA, as District Attorney of the County of Kings, Defendant.

Appearances:

Emanuel Redfield, Esq., Attorney for Plaintiff.

Aaron E. Koota, Esq., District Attorney of the County of Kings;

Irving L. Rollins, Esq., Assistant Attorney General, Of Counsel.

OPINION—May 20, 1966

ROSLING, J.

Plaintiff moves for an order granting a preliminary injunction in his favor enjoining the defendant District Attorney of Kings County from interfering with his pro-

[File endorsement omitted]

posed distribution of a political leaflet. It is plaintiff's expressed plan that the distribution is to be anonymous in the sense that the leaflet will not comply with the requirement of § 781-b of the Penal Law of the State of New York to print or reproduce on the document the name and post office address of the "printer" as defined in such section.[1]

[fol. 27] Section 782 declares a first offense a misdemeanor punishable by imprisonment for not more than one year or by a fine of not less than $100 nor more than $500, or [fol. 28] by both such fine and imprisonment. A person convicted of a misdemeanor is as to a second or subsequent offense guilty of a felony.

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[1] § 781-b. Printing or other reproduction of certain political literature.

"No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also so printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

"The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal."

Contending that the enforcement of the statute will cause immediate and irreparable injury to the plaintiff, he additionally asks that a statutory court of three judges be convened in accordance with the provisions of 28 U.S.C. § 2284. Plaintiff maintains that the statute establishing the offense is unconstitutional in its infringement of his rights under Amendments 1 and 14 of the Constitution of the United States.

Defendant cross-moves for an order dismissing the complaint pursuant to Rule 12(b)(1)(6) of the Fed. R. Civ. P. on the ground (a) that this court lacks jurisdiction of the subject matter and (b) that the complaint in the absence of diversity of citizenship fails to state a claim within the original jurisdiction of the United States District Court upon which relief can be granted. In support of his motion plaintiff submits a verified complaint which in its detail violates the prescription of Fed. R. Civ. P. 8(a) that a pleading shall contain a short and plain statement of the claim, but this very detail supplies sufficient evidentiary data to constitute the pleading an adequate affidavit in support of the motion.[2] It would appear that a substantial [fol. 29] question is not foreclosed by earlier decision.[3]

Finding, therefore, that the hearing of plaintiff's motion by a three-judge district court is appropriate, the court has, pursuant to 28 U.S. Code 2284, notified the Chief

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[2] Reed Enterprises v. Corcoran, 354 F.2d 519 (D.C. Cir. 1965) at p. 522: "Ordinarily, in injunction proceedings seeking to restrain enforcement of an allegedly unconstitutional statute, once a substantial question of constitutionality is raised and the complaint 'at least formally alleges a basis for equitable relief,' a three-judge court is required. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715, 82 S. Ct. 1294, 1296, 8 L.Ed.2d 794 (1962). Here the allegations in the complaints unquestionably outline a basis for equitable relief. For the purpose of determining whether three-judge courts are required, these allegations, unless obviously colorable, must be taken as true, and the answers of the Government addressed to three-judge courts."

[3] Bailey v. Patterson, 369 U.S. 31, 82 S. Ct. 549 (1962); Talley v. California, 362 U.S. 60, 80 S. Ct. 536 (1960); Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116 (1965).

Judge of this Circuit of the application and requested him to designate two other judges to serve with the undersigned as members of the court to hear and determine the action. Plaintiff's motion insofar as it seeks a temporary injunction and defendant's cross-motion to dismiss the complaint will upon such court being constituted be referred to it for hearing and determination.

Settle order on notice.

George Rosling, U. S. D. J.

[fol. 31]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

66-C-375

[Title omitted]

ORDER DESIGNATING JUDGES—May 24, 1966

Having been notified by the Honorable George Rosling, United States District Judge for the Eastern District of New York, that an application has been filed in the above matter for relief pursuant to Title 28 United States Code Section 2281, pursuant to Title 28 United States Code Section 2284 I hereby designate the following judges, in addition to Honorable George Rosling, to hear and determine said cause as provided by law: Honorable Irving R. Kaufman, United States Circuit Judge, and Honorable Joseph C. Zavatt, United States District Judge for the Eastern District of New York.

It Is Hereby Ordered that this order be filed in the above entitled cause in the said District Court.

J. Edward Lumbard, Chief Judge, United States Court of Appeals for the Second Circuit.

Dated: New York, N. Y., May 24, 1966.

[File endorsement omitted]

[fol. 32]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil No. 375/1966

[Title omitted]

NOTICE OF AND ORDER GRANTING MOTION TO CONVENE A THREE-JUDGE COURT, ETC.—Filed May 31, 1966

Please Take Notice that the within order will be presented for settlement to the Hon. George Rosling, on May 27, 1966, at 10:00 A.M.

Dated: New York, New York, May 23, 1966.

Yours, etc.,

Emanuel Redfield, Attorney for Plaintiff, Office & P.O. Address, 60 Wall Street, New York 5, New York, HAnover 2-1023.

To: Louis J. Lefkowitz, Esq., Attorney for Defendant, 80 Centre Street, New York, New York.

[File endorsement omitted]

[fol. 33]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

The plaintiff having moved this court for an order granting a temporary injunction and for the convening of a three-judge court pursuant to 28 U.S.C. Section 2284, and the defendant having moved this court for an order dismissing the amended complaint, and the court having considered the amended complaint in support of the motion

and the affidavit and motion in opposition thereto, and having heard the arguments of counsel, it is

Ordered, that the motion of the plaintiff for an order to convene a three-judge court pursuant to 28 U.S.C. Section 2284 be and the same hereby is granted; and it is further

Ordered, that the motion of the plaintiff for a temporary injunction and the motion of the defendant for the dismissal of the amended complaint are hereby referred to said three-judge court for hearing and determining said cause.

Dated: New York, New York, May 31, 1966.

George Rosling, United States District Judge.

[fol. 34] Affidavit of Service by Mail (omitted in printing).

[fol. 35]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63-C-375

SANFORD ZWICKLER, Plaintiff,

—against—

AARON E. KOOTA, as District Attorney for the County of Kings, Defendant.

EXCERPT OF HEARING OF JUNE 9, 1966

United States Court House
Brooklyn, New York
11:00 o'clock A. M.

Before:

Honorable Irving R. Kaufman, United States Circuit Court Judge, Honorable Joseph C. Zavatt, Chief Judge, United States District Court, Honorable George Rosling, United States District Court Judge.

[File endorsement omitted]

Appearances:

Emanuel Redfield, Esq., Attorney for Plaintiff.

Louis J. Lefkowitz, Esq., Attorney General, State of New York, Attorney for Defendant, By: Irving L. Rollins, Esq., Assistant Attorney General.

[fol. 36]

The Clerk: Civil Hearing. Sanford Zwickler versus Aaron E. Koota, District Attorney, Kings County.

Mr. Redfield: Ready for the plaintiff.

Mr. Rollins: Ready for defendant.

Judge Kaufman: How do you want to proceed on this? Do you want to argue your motion to dismiss first, or do you want to argue your application first?

Mr. Rollins: I will take any recommendation the Court makes.

Mr. Redfield: It doesn't make any difference.

Judge Kaufman: I think it will put it in better perspective if we heard your application to dismiss.

Mr. Redfield: May I suggest, before we begin, your Honor, that counsel for both sides have agreed between themselves that this motion be considered as looking toward a final judgment.

Judge Kaufman: In other words, we are to consider this the hearing on the application for a permanent injunction?

Mr. Redfield: Yes, sir.

[fol. 37]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

66-C-375

SANFORD ZWICKLER, Plaintiff,

—against—

AARON E. KOOTA, as District Attorney of the County of Kings, Defendant.

Before: Kaufman, Circuit Judge, Zavatt, Chief Judge, and Rosling, District Judge.

Appearances:

Emanuel Redfield, Esq., Attorney for Plaintiff.

Louis J. Lefkowitz, Esq., Attorney General of the State of New York; Attorney for Defendant, Samuel A. Hirshowitz, Esq., First Assistant Attorney General, Irving L. Rollins, Esq., Assistant Attorney General, Of Counsel.

Zavatt, Chief Judge:

[fol. 38]

OPINION—September 19, 1966

On the motion of the plaintiff, a three-judge court was convened, pursuant to 28 U.S.C. § 2284. The plaintiff seeks an order enjoining the defendant from prosecuting him under section 781-b[1] of the New York Penal Law, which the plaintiff contends is violative of the First Amendment as made applicable to the states through the Fourteenth Amendment. The defendant has made a cross-motion to dismiss the amended complaint upon the grounds (1) that this court lacks subject-matter jurisdiction and (2) that the amended complaint fails to state a claim upon which this court can grant relief. For the reasons herein-

[File endorsement omitted]

after stated, the plaintiff's motion is denied; the defendant's motion is granted.

The New York statute under attack prohibits, among other things, and renders criminal the distribution of anonymous political literature "in quantity." A first offense under the statute is punishable as a misdemeanor; subsequent offenses, however, constitute felonies. At the present time the plaintiff is not distributing anonymously any such political literature nor is he being prosecuted for any such distribution made by him prior to the institution of this action. He grounds his amended complaint and his motion for an injunction primarily upon what hap- [fol. 39] pened to him during the 1964 political campaign and his apprehension as to what may transpire during 1966 and subsequent political campaigns.

During the 1964 political campaign, the plaintiff distributed an anonymous leaflet[2] critical of a named candidate for reelection to the House of Representatives. He was charged with a violation of section 781-b of the New York Penal Law and found guilty after a trial (at which he presented no evidence) by the Criminal Court of the City of New York, County of Kings, despite his contention that section 781-b violates the Fourteenth Amendment. *People* v. *Zwickler* (Crim. Ct., N.Y. City, Kings Co., Feb. 10, 1965, unreported). The judgment of conviction was "unanimously reversed on the facts." *People* v. *Zwickler* (Sup. Ct., App. T., Kings Co., April 23, 1965, unreported):

> "In our opinion, the People failed to establish that defendant distributed anonymous literature 'in quantity' in violation of the provisions of Section 781(b) [sic] of the Penal Law. We do not reach the question of the constitutionality of the statute involved."

The New York Court of Appeals affirmed without opinion the reversal of the judgment of conviction. *People* v. *Zwickler,* 16 N.Y. 2d 1069, 266 N.Y.S. 2d 140 (1965).

Prior to September 1, 1962, section 781-b applied only to [fol. 40] the anonymous printing and reproduction (not the

distribution) "in quantity" of political literature in connection with any election of public officers or of candidates for nomination for public office. It did not apply to such literature in connection with any election of party officials or candidates for nomination for a party position. It was not until September 1, 1962 that this section was expanded to apply to *distribution* of such literature "in quantity." L. 1962, c. 576, eff. September 1, 1962. Prior to this 1962 amendment, one Robert Clampitt distributed anonymous handbills in connection with a primary election for the selection of a district leader of the Democratic Party. He was running in that primary in opposition to the incumbent, who was seeking redesignation. Clampitt was charged with a violation of section 781-b. At the close of the People's case, Clampitt's motion to dismiss the information was granted and he was discharged. *People* v. *Clampitt,* 34 Misc. 2d 766, 222 N.Y.S.2d 23 (Ct. Spec. Sess. N.Y. Co. 1961). The court held that (1) section 781-b did not apply to anonymous literature in connection with an election of candidates for party office; (2) that it did not apply to the distribution of anonymous political literature and (3) that, even as to those instances to which it did [fol. 41] apply, it was "void for indefiniteness and uncertainty." "Just what is meant by 'in quantity' is not defined. How much or how little is 'in quantity'?" "The public should not be compelled to indulge in guessing games where violations of criminal law are concerned." *Clampitt, supra,* 34 Misc. 2d at 768, 222 N.Y.S.2d at 25-26. The "in quantity" aspect of the validity of the section was not passed upon by the New York Court of Appeals in *Zwickler, supra.* Nor did that court consider the constitutionality of section 781-b under the Fourteenth Amendment to the Constitution of the United States or under Article 1, section 8 of the Constitution of the State of New York.[3]

In his amended complaint, the plaintiff alleges his intention and desire to distribute in the future and "in quantities of more than a thousand copies" the anonymous leaflet he distributed in 1964[4] "and similar anonymous

leaflets, all prepared by and at the instance of a person other than the plaintiff"; to do so "at any time during the election campaign of 1966 and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966." The plaintiff does not accuse Aaron E. Koota, the District Attorney of Kings County, New York, of bad [fol. 42] faith. Rather, he praises him as a "diligent and conscientious public officer" and presumes to read Mr. Koota's mind by alleging that Mr. Koota "pursuant to his duties intends or will again prosecute the plaintiff for his [intended] acts of distribution" of anonymous political literature. He regards this presumption as "the threat of prosecution" which places him "in fear of exercising his right to make distribution as aforesaid" and which places him "in danger of again being prosecuted therefor." Upon these assumptions he grounds his prayers for relief for (1) a declaration that section 781-b is unconstitutional as violative of the First and Fourteenth Amendments; (2) an injunction restraining the defendant from prosecuting him for his intended distributions of political literature and (3) an injunction pendente lite. From a reading of the amended complaint, it would appear that it has been drafted in the hope of bringing this case within *Dombrowski* v. *Pfister*, 380 U.S. 479, 85 S.Ct. 1116 (1965). And, as a matter of fact, the memorandum of law of plaintiff's counsel leans heavily upon that opinion.

The threshold question is whether or not this court should temper the exercise of its equitable power to enjoin the defendant. As far back as *Ex parte Young*, 209 U.S. [fol. 43] 123, 28 S.Ct. 441 (1908), the Supreme Court recognized the power of a federal court to enjoin a threatened prosecution by a state official under a state statute in a case reasonably free froum doubt. "[N]o injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the Federal courts." 209 U.S. at 166-67, 28 S.Ct. at 457.

Since *Young, supra,* "considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good faith administration of its criminal laws is peculiarly inconsistent with our federal framework." *Dombrowski, supra,* 380 U.S. at 484, 85 S.Ct. at 1119-20. The complaint states a claim under the Civil Rights Act, 28 U.S.C. § 1343 (4), since it alleges a deprivation of a right guaranteed by the Fourteenth Amendment. It alleges a case or controversy which is within the adjudicatory power of this court. *Douglas* v. *City of Jeannette,* 319 U.S. 157, 162, 63 S.Ct. 877, 880 (1943). This is not to say, however, that this court necessarily agrees with the plaintiff's contention that "freedom of expression" includes freedom to express one's views by criticizing a named public officer or a named candidate for public office, under the cloak of anonymity. [fol. 44] This question was not involved in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710 (1964). See *Bertelsman, Libel and Public Men,* 52 A.B.A.J. 657 (July 1966).

The fact that a case is within the adjudicatory power of this court does not necessarily require that its power be exercised. As a general rule and policy a district court, on its own motion, may, in its discretion, refuse to act. "Especially should it do so where its powers are invoked to interfere by injunction with threatened criminal prosecutions in a state court." *Douglas, supra,* 319 U.S. at 162, 63 S.Ct. at 880. In *Douglas,* the plaintiffs, Jehovah's Witnesses, brought suit in a district court to restrain threatened criminal prosecution in a state court for violation of a city ordinance which prohibited the solicitation of orders for merchandise without first procuring a city license, claiming that the city ordinance violated the Fourteenth Amendment. The trial court found that certain of the plaintiffs and other Jehovah's Witnesses had been prosecuted previously by the defendants for distributing literature without having first obtained a license and having paid a tax therefor; that the defendants had declared their intention fur-

ther to enforce the ordinance against the plaintiffs. But the trial court made no finding of threatened irreparable [fol. 45] injury to the plaintiffs. As to this, the Supreme Court said: "we cannot say that the declared intention to institute other prosecutions is sufficient to establish irreparable injury in the circumstances of this case." *Douglas, supra,* 319 U.S. at 164, 63 S.Ct. at 881. On the same day the Court rendered its opinion in *Murdock v. Commonwealth of Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, involving the same city ordinance under which Jehovah's Witnesses were prosecuted for distributing religious literature and soliciting the purchase of religious books and pamphlets. *Murdock* presented a single issue "The constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities." *Murdock, supra,* 319 U.S. at 110, 63 S.Ct. at 873. The convictions of the defendants in the state court were reversed on the ground that the ordinance imposed a tax upon the constitutional rights of the free exercise of religion, freedom of speech and freedom of the press. And because the Court held invalid in *Murdock* the same city ordinance under review in *Douglas,* it affirmed in *Douglas* the reversal by the Court of Appeals of the judgment for the plaintiff in the district court. Since an injunction looks to the future and "in view of the decision rendered today in *Mur-* [fol. 46] *dock, et al.* v. *Pennsylvania, supra,* we find no ground for supposing that the intervention of a federal court, in order to secure petitioner's constitutional rights, will be either necessary or appropriate." *Douglas, supra,* 319 U.S. at 165, 63 S.Ct. at 882. The Court said that "courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution *in good faith* for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily

in the criminal case as in a suit for injunction. . . . Where the threatened prosecution is by state officers for alleged violation of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported *only on a showing of danger of irreparable injury 'both great and immedi-* [fol. 47] *ate.'*" *Douglas, supra,* 319 U.S. at 163-164, 63 S.Ct. at 881. (Emphasis added.)

It may be argued that the principle of abstention illustrated by *Douglas, supra,* is inapposite because, on the very day *Douglas* was decided, the Supreme Court had held the statute involved therein to be unconstitutional in *Murdock, supra.* However, subsequent cases demonstrate that the doctrine of judicial abstention remains fully viable. In *Harrison* v. *N.A.A.C.P.,* 360 U.S. 167, 79 S.Ct. 1025 (1959), decided several years after *Douglas* and involving Fourteenth Amendment rights, a three-judge statutory court permanently enjoined the Attorney General of Virginia and other officials from enforcing certain statutes of the Commonwealth of Virginia which imposed conditions upon the right to make public solicitation of funds and to expend such funds for litigation involving racial segregation. *N.A.A.C.P.* v. *Patty,* 159 F.Supp. 503 (E.D.Va. 1958).

The state statutes involved had not been authoritatively construed by the courts of Virginia. Nevertheless the three-judge court felt that it should not abstain; that it should pass upon the constitutionality of these statutes because it considered them free from ambiguity and that there was no reasonable interpretation which would render [fol. 48] them constitutional. It held certain chapters of the law to be unconstitutional and permanently enjoined their enforcement. As to two chapters the court did not pass upon their constitutionality. Rather, it retained jurisdic-

tion and allowed the complaining parties a reasonable time within which to obtain a state interpretation. On appeal, the Supreme Court vacated the judgment and remanded the case with instructions so as to afford the Virginia courts a reasonable opportunity to construe the statutes, believing as it did, that they were fairly open to interpretation and that the state courts should have been afforded a reasonable opportunity to pass upon them. The Supreme Court did not agree that the statutes left no reasonable room for a construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutional adjudication or at least materially change the nature of the problem. It referred to the well-established principle of abstention:

> "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. . . . In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts [fol. 49] have been afforded a reasonable opportunity to pass upon them. . . . This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication.
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> * * * * * * *
>
> We do not intimate the slightest view as to what effect any such determinations might have upon the validity of these statutes. All we hold is that these enactments should be exposed to state construction or limiting interpretation before the federal courts are

asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court. . . . And of course we shall not assume that the Virginia courts will not do their full duty in judging these statutes in light of state and federal constitutional requirements." 360 U.S. 176-78, 79 S.Ct. 1030-31.

The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law. It involves a discretionary exercise of a court's equity powers. In *Baggett* v. *Bullitt,* 377 U.S. 360, 84 S.Ct. 1316 (1964), the Supreme Court reversed a three-judge United States District Court which abstained and refused to pass upon the constitutionality of a state statute. Whether the court should have abstained, said the Supreme Court, depended upon "whether there exist 'special cir-[fol. 50] cumstances' prerequisite to its application. . . ." It found that such "special circumstances" were not present and, therefore, that the three-judge court should not have abstained from passing upon the constitutional question.

In *Dombrowski* v. *Pfister,* 380 U.S. 479, 85 S.Ct. 1116, the Supreme Court reversed a three-judge statutory court which had dismissed the complaint in an action under the Civil Rights Act to restrain the defendants from prosecuting the plaintiffs for alleged violations of the Louisiana Subversive Activities and Communist Control Law and Communist Propaganda Control Law. Here, the Supreme Court looked for special circumstances to justify the exercise of federal court jurisdiction rather than for special circumstances to justify a federal court in abstaining to exercise its jurisdiction:

"And in a variety of other contexts the Court has found no special circumstances to warrant cutting short the normal adjudication of constitutional defenses in the

course of a criminal prosecution." 380 U.S. at 485, 85 S.Ct. at 1120.

It found the presence of such special circumstances in *Dombrowski* and, therefore, reversed the judgment of the three-judge court.

The complaint in *Dombrowski*, supported by affidavits and a written offer of proof, alleged that the threats to [fol. 51] enforce the statutes were not made with any expectation of securing valid convictions but, rather, were part of a plan to employ arrests, seizures and threats of prosecution under color of the statutes to harass the appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of the citizens of Louisiana. The Supreme Court noted probable jurisdiction in order to resolve a seeming conflict between the decision of the lower court in 227 F.Supp. 556 and the later decision of the Supreme Court in *Baggett* v. *Bullitt, supra,* "and to settle important questions concerning federal injunctions against state criminal prosecutions threatening constitutionally protected expression." 380 U.S. at 483, 85 S.Ct. at 1119. There, the good faith of the enforcement officers was attacked. The appellants claimed that these officers invoked and threatened to continue to invoke criminal process without any hope of ultimate success, but only to discourage the civil rights activities of the appellants. Dombrowski and others were arrested by Louisiana state and local police and charged with violations of the two state statutes. Their offices were raided and their files and records seized. At gunpoint their homes and offices were raided and ransacked by police officers and trustees of the House of Detention, [fol. 52] acting under the direct supervision of the staff director, and the counsel for the State Un-American Activities Committee. The home and office of the director of the Southern Conference Educational Fund were also raided. Judge Wisdom's dissenting opinion in the court below observed that "Among the dangerous articles re-

moved was Thoreau's Journal." Although the court granted a motion to suppress the seized evidence, Louisiana officials continued to threaten prosecution. The grand jury was summoned to hear evidence looking to indictments of the individual appellants. Despite a temporary restraining order issued by Judge Wisdom, the district court dissolved that order and dismissed the complaint. Thereafter, the grand jury returned indictments under the two state statutes against the individual appellants. The appellees repeated announcements that the appellant organization was a subversive or Communist-front organization; that its members must register or be prosecuted—these announcements, together with the other events preceding them, frightened off potential members and contributors.

Under the "special circumstances" present in *Dombrowski,* the Supreme Court held that this was not a case for the application of the doctrine of abstention:

> [fol. 53] "We hold the abstention doctrine is inappropriate for cases *such as the present one* where, unlike Douglas v. City of Jeannette, statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities." 380 U.S. 489-90, 85 S.Ct. at 1122. (Emphasis added.)

It found that "the allegations in this complaint depict the situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights." "Here, no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution . . . ." 380 U.S. at 485, 491, 85 S.Ct. at 1120, 1123. But the Court did not repudiate the doctrine of abstention in all cases involving Fourteenth Amendment rights. Where cases do not involve "special circumstances" to justify the exercise of a federal court's equitable powers, it quoted with approval from *Douglas, supra*:

> "In such cases it does not appear that the plaintiffs 'have been threatened with any injury other than that

incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court.'" 380 U.S. at 485, 85 S.Ct. at 1120.

The sound principle of abstention alluded to in *Douglas, supra,* is questioned by the plaintiff whenever there is a [fol. 54] threat or assumed threat of state prosecution in violation of what the plaintiff terms the "right of expression." The plaintiff assumes that the "right of expression" directed at named political personages embraces the right to express opinions as to such persons behind the mask of anonymity. He points to *Dombrowski, supra,* to support his contention that the defendant in the instant case should be enjoined by this court from prosecuting him in the future for distributing anonymous political literature.

This court does not find present here the "special circumstances" to justify the exercise of federal judicial equity power. There is no suggestion that the alleged threatened prosecution of the plaintiff in the instant case will be undertaken in bad faith or that the plaintiff's defense to any such prosecution will not assure him adequate vindication of his alleged constitutional rights. In fact, a lower New York state court has already held the statute in question to be unconstitutional for vagueness, *People* v. *Clampitt, supra,* and this plaintiff's conviction in 1964 was reversed in *People* v. *Zwickler, supra,* for failure of proof that he had distributed anonymous political literature "in quantity." This court has no reason to believe that a court, as enlightened and distinguished as the New [fol. 55] York State Court of Appeals, will not assure this plaintiff adequate vindication of his constitutional rights.

There is available to the plaintiff a state remedy short of asserting defenses in a criminal prosecution. He may, if he desires, institute an action in the state court for a

declaratory judgment. N.Y. CPLR § 3001. *De Veau* v. *Braisted*, 5 App. Div. 2d 603, 174 N.Y.S. 2d 596 (2d Dep't 1958), *aff'd*, 5 N.Y.2d 236, 183 N.Y.S. 2d 793 (1959), *aff'd*, 363 U.S. 144, 80 S.Ct. 1146 (1960). Should "special circumstances" arise which would not justify further abstention, the parties, of course, may seek appropriate relief in the federal courts.

The plaintiff's motion for a preliminary injunction is denied. The defendant's motion to dismiss the amended complaint is granted. Settle an order consistent herewith on or before ten (10) days from the date hereof.

Irving R. Kaufman, Circuit Judge, Joseph C. Zavatt, Chief Judge.

[fol. 56] [1] "§ 781-b. Printing or other reproduction of certain political literature

No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also so printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed,

published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal. As amended L. 1957, c. 717; L. 1962, c. 576, eff. Sept. 1, 1962."

[2] "REPRESENTATIVE MULTER—EXPLAIN YOUR POSITIONS

AID TO NASSER

[fol. 57] 'On September 2, 1964, an amendment was proposed to a foreign aid bill (Public Law 480). In substance, it would have cut off all aid to the United Arab Republic. Congressman Multer spoke at length against the amendment, and in his own words, urged its defeat 'as earnestly as I can'. He stated that his position was based on 'humanitarian instinct'. (Congressional Record 20792).

In this respect, the following should be noted

(a) Congressman Multer's stand permits the diversion of funds by Dictator Nasser to his armaments buildup.

(b) The United Arab Republic is also a recipient of aid from Communist Russia.

(c) Egypt is now employing the technical skills of scientists, formerly under the employ of the Nazis.

(d) Congressman Multer debated against the amendment on the eve of the summit conference held in Cairo by 13 Arab States which are threatening the peace of the Near East and the State of Israel in particular.

SOVIET ANTI-SEMITISM

The 1964 Foreign Aid bill was passed in the United States Senate with an amendment sponsored by Senator Abraham Ribicoff (D. Conn.) that strongly condemned the anti-Semitic practices of the Soviet Union. When this issue was brought to the House-Senate conferees, a much more general statement decrying all types of religious bigotry was adopted.

Representative Multer praised this 'watered down' measure on the House floor, and stated:

'While the Senate version did point the finger directly at Soviet Russia, the version as finally adopted, I think, is much the better one.'

'I believe, instead of pointing the finger at the culprit now before the bar of world public opinion where it is being [fol. 58] so severely condemned, it is much better that this Congress go on record as it is doing now, against religious persecution wherever it may raise its ugly head.' (Congressional Record 22850).

WHY MR. MULTER. WHY ? ? ? ? ?

[3] "§ 8. [Freedom of speech and press; criminal prosecutions for libel.]

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

[4] See note 2.

[fol. 59]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket #66 Civ. 375

[Title omitted]

NOTICE OF AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND GRANTING DEFENDANT'S MOTION TO DISMISS THE COMPLAINT—Filed September 29, 1966

Please Take Notice that the within order will be presented for settlement on September 22, 1966, at 10:00 A.M. at the United States District Court, Eastern District of New York.

Dated: New York, New York, September 20, 1966.

Yours, etc.,

Emanuel Redfield, Attorney for Plaintiff, Office & P. O. Address, 60 Wall Street, New York 5, New York, HAnover 2-1023.

To: Louis J. Lefkowitz, Esq., Attorney General, 80 Centre Street, New York, New York.

[File endorsement omitted]

[fol. 60]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket #66 Civ. 375

[Title omitted]

ORDER

The plaintiff, having moved for a preliminary injunction in favor of plaintiff to enjoin enforcement of Section 781-b of the Penal Law of the State of New York on the ground the said law is unconstitutional, and for the convening of a statutory three-judge court to hear said application, and the defendant having moved for an order dismissing the complaint, and the motion for the convening of a statutory three-judge court having been granted by the Hon. George Rosling, United States District Judge, and the said court consisting of the Hon. Irving Kaufman, Circuit Judge of the Second Circuit, the Hon. Joseph C. Zavatt, Chief Judge of the United States District Court for the Eastern District of New York and the Hon. George Rosling, United States District Judge for the Eastern District of New York, having been convened on June 9, 1966 and the said application having been heard on said date and the said court having filed its opinion on September 19, 1966 in favor of the defendant, Judge Rosling dissenting, it is

[fol. 61] Ordered, that the motion of the plaintiff for a preliminary injunction be and the same is hereby denied; and it is further

Ordered, that the motion of the defendant to dismiss the complaint be and the same hereby is granted.

Dated: the 29 day of September, 1966.

Irving R. Kaufman, United States Circuit Judge.

Joseph C. Zavatt, United States District Judge.

[fol. 62] Affidavit of Service by Mail (omitted in printing).

[fol. 63]

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Date: Oct. 11, 1966

[Stamp—FILED in Clerk's Office, U. S. District Court, E.D. N.Y., Oct. 12, 1966]

To : Clerk, U. S. District Court
E.D.N.Y.

From : Irving R. Kaufman

Subject: *Zwickler* v. *Koota*

Attached is my revised concurring opinion in *Zwickler* v. *Koota*. I request that it be substituted for the concurring opinion that is currently on file.

Irving R. Kaufman, United States Circuit Judge.

Enclosure

[fol. 64]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

66-C-375

SANFORD ZWICKLER, Plaintiff,

—against—

AARON E. KOOTA, as District Attorney of the County of Kings, Defendant.

REVISED CONCURRING OPINION OF KAUFMAN, *C.J.*—
October 12, 1966

[fol. 65] KAUFMAN, *C.J.* (concurring in opinion of Judge Zavatt):

In light of Judge Rosling's dissent, I feel that it is necessary for me to state briefly my understanding of the

[File endorsement omitted]

majority opinion so that its meaning is not lost. The majority lays down no broad rule of federal abstention in cases where freedom of expression is threatened, but rather follows those principles enunciated by the Supreme Court in the *Dombrowski* case. The Court there recognized that "federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. . . . The mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." The facts presented in the appeal before us offer a vivid contrast to those alleged in *Dombrowski.* The illegal raids and threats of prosecution made by Louisiana officials in *Dombrowski,* resembled only too closely those tactics employed by totalitarian regimes dedicated to suppressing freedom of expression. In light of the oppressive circumstances presented in that case, the Supreme Court could well infer that "the State's criminal prosecution will not assure adequate vindication of constitutional rights."

But, such inference cannot be reasonably drawn in the case now before us. Zwickler does not charge that New [fol. 66] York state officials have harassed him, or even that he has been threatened with prosecution. Rather he fears that the District Attorney will again, in good faith, prosecute him—a fear that should be somewhat alleviated by the fact that Zwickler's conviction was unanimously reversed by the New York courts in 1965. And, there is no basis for inferring that New York's criminal processes, if invoked, will not assure Zwickler adequate vindication of his constitutional rights. Moreover, Zwickler's exercise of what he believes to be his rights, need not be "chilled." He need not wait for state officials to act before he can challenge the constitutionality of § 781-b. Rather he may take the initiative and institute a declaratory judgment action in the New York courts; and, in addition he may seek expedition of his case if there is any threat of prosecution—though such a threat seems unreal in light of

Zwickler's previous successful encounter with the statute. The Supreme Court's decision in *Baggett* v. *Bullitt* did not, as Judge Rosling suggests, reject for all time resort to the state's declaratory judgment procedures. Rather, the Court found that "In *these circumstances* [presented in *Baggett*] it is difficult to see how an abstract construction of the challenged terms . . . in a declaratory judgment action could eliminate the vagueness of these terms. It is fictional to believe that anything less than *extensive adjudications,* under the impact of a variety of factual situations, [fol. 67] could bring the oath within the bounds of permissible constitutional certainty." 377 U.S. 378. (Emphasis added.) The facts presented in the case before us differ radically. I see no reason to believe that "extensive adjudications" would be required were Zwickler to challenge § 781-b in a declaratory judgment act. And the State courts can adjudicate, as rapidly as the Federal courts, Zwickler's simple contention that the statute is unconstitutional because it is overbroad.

In light of all of these factors, the case now before us does not present those special circumstances found in *Dombrowski* and *Baggett.* Rather, the facts in this case clearly indicate that our discretion will be exercised in the wisest manner if, as is consistent with our federal framework, we permit the courts of the state to deal first with the question raised by Zwickler.

Irving R. Kaufman, United States Circuit Judge.

[fol. 68]

UNITED STATES GOVERNMENT

MEMORANDUM

Date: October 14, 1966

[Stamp—FILED in Clerk's Office, U. S. District Court, E.D. N.Y., Oct. 14, 1966]

To: Lewis Orgel, Clerk of the Court

From: George Rosling, U.S.D.J.

Subject: Zwickler v. Koota, 66-C-375

Herewith is my revised dissent in the above to be substituted for my original dissent filed September 19, 1966. Such original dissent is withdrawn and should accordingly be detached from the majority opinion filed September 19, 1966.

George Rosling

Enclosure

cc:

Hon. Irving R. Kaufman, United States Circuit Judge.

Hon. Joseph C. Zavatt, Chief Judge, United States District Court.

[fol. 69]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
66-C-375

SANFORD ZWICKLER, Plaintiff,

—against—

AARON E. KOOTA, as District Attorney of the County of Kings, Defendant.

REVISED DISSENTING OPINION—October 14, 1966

ROSLING, J.

This dissent is only from so much of the majority's holding that the basic, but residual, question of constitutionality of Penal Law § 871(b) should be passed back to the state courts for adjudication while we abstain. The question of constitutionality, however, is necessarily reached if the dissent correctly holds that we must not abstain. That the provision is unconstitutional for overbreadth the Attorney General in his brief substantially acknowledges by citing the legislative history of the most recent (1962) amendment of the provision as basis for a judicial, possibly, a case by case, narrowing of the law to a constitutional dimension. What he proposes is that the courts by decisional law do what the New York State legislature did by amendment after the state Court of Appeals had stricken down in People v. Mishkin, 17 A.D.2d 243 (1st Dept. 1962), aff'd 15 N.Y.2d 671 (1964), the overbroad Section 330 (subd. 2) of the General Business Law.

[fol. 70] The statute construed in Mishkin contained a self-identification requirement which swept within its scope

[File endorsement omitted]

all publications without distinguishing between that which by reason of its content had forfeited the protection the First Amendment affords, and other matter not thus disentitled. The post-Mishkin amendment, still untested by the courts, expressly restricts its compelled self-identification to what, hopefully, has forfeited constitutional protection as hard core pornography. Mishkin in turn rests on Talley v. State of California, 362 U.S. 60, 80 S.Ct. 536, which held that a city ordinance (Los Angeles) barring distribution of any handbill in any place under any circumstances unless the provenance thereof was noted thereon was unconstitutional as abridging freedom of speech and press secured against such invasion by the First and Fourteenth Amendments. I do not find in the Talley holding any express or sharply implied qualification of the principle announced that would permit a judicial pruning of a statute thus overbroad in the First Amendment area, so that what remains may be rendered viable.

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964), admonishes those in the public eye that constitutional immunity extends to the writers of all that is written in criticism of their public action, even though falsely written, absent a showing of actual malice.

Mills v. Alabama, 384 U.S. 214, 86 S.Ct. 1434, denies [fol. 71] to the state authority to censor by penalizing writings made so close to an election, that no time is available for answer. That the voters may be misled by such ex parte and unexposed slanders is at once apparent. But, according to Mills, the policing of the truth to insure that the voter makes a choice uninfluenced by belated falsehood or distortion is not a function of government. Nor does it become the function of government to do so upon a showing that public officials are aided by private persons, however honorable and honorably motivated. Cf. Bantam Books v. Sullivan, 372 U.S. 585, 83 S.Ct. 631 (1963). Nor should we by abstention fail to declare, if precedent has thus determined, unconstitutional a law so patently overbroad.

Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316 (1964), comments (p. 373) that "[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." Justice White, writing for the court, rejected abstention as inappropriate, for "[i]t is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath [penalties for nonjuring teachers was involved]—within the bounds of constitutional certainty. Abstention does not require this." [id. at p. 378]

Rejected too, by Baggett was resort to a state tribunal for a declaratory judgment on the issue of constitutionality, a suggestion advanced by the majority here. The slow, [fol. 72] particularistic process of litigation in state forums and its cost are noted further by Justice White as "inhibit[ing] the exercise of First Amendment freedoms." [id. at p. 378, 379]

Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116 (1965), an action brought under the Civil Rights Act, Rev. Statute § 1979, 42 U.S.C. § 1983 (1958 ed.) is discussed at length and passim by the majority of this panel, and is read by them, although not expressly so stated in the opinion, as authorizing the retention of jurisdiction only upon a showing of a context of threats, violence and disorders which by harassment discourages those petitioning this court for relief, from attempting to vindicate their constitutional rights through proceedings in the state courts. Dombrowski strongly and expressly upheld the Baggett principles [id. 491], yet Baggett involved *no* claims of acts of *violence* or of *indignities* visited upon the nonjuring teachers who pressed their suit in the federal forum.

The majority here, it would appear, have read into the principles for which Dombrowski stands, the accidental and adventitious environment of violence, and assigned to it a role integral to the ratio decidendi. Dombrowski, however, does not justify such gloss.

Thus Dombrowski, at p. 486, "we have consistently allowed attacks on overly broad statutes with no requirement

[fol. 73] that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."

And, quoting NAACP v. Button, 371 U.S. 415 at p. 433, it approves the statement in that opinion which speaks of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." [id. 487]

Dombrowski decries delay in "vindication of freedom of expression await[ing] the outcome of protracted litigation," and even more forcefully rejects the contention "that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of prosecution, unaffected by the prospect of its success or failure." [id. at p. 487]

But, most significantly, Dombrowski distinguishes its own context from that of Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877 (1944), in which there was no atmosphere of state violence or breakdown of the judicial process, the distinction being on grounds which make clear that although the presence of violence and other disruptive circumstances may dictate retention, their absence does not, conversely, dictate abstention.

Dombrowski declares [pp. 489-490]: "We hold the abstention doctrine is inappropriate for cases such as the [fol. 74] present one where, unlike Douglas v. City of Jeannette, statutes are justifiably attacked *on their face* OR as *applied* for the purpose of discouraging protected activities." [Emphasis supplied] Only the second of the alternatives cited contemplates violence as of material relevance. The first alternative, instanced by our proceeding, needs only a statute void on its face as the pivotal condition for retention of a First Amendment suit where chilling is a natural consequence of our abstention. See excerpt from Baggett, supra p. 3.

Finally, and in my view conclusive upon us as obliging us to retain, is the statement in Dombrowski which declares the sequence of the Federal and State procedures when the statute is thus overbroad on its face.

> "The State must, if it is to invoke the statutes after injunctive relief has been sought, assume the burden of obtaining a permissible narrow construction in a noncriminal proceeding *before* it may seek modification of the injunction to permit future prosecutions. * * * Our view of the proper operation of the vagueness doctrine does not preclude district courts from modifying injunctions to permit prosecutions in light of subsequent state court interpretation clarifying the application of the statute to particular conduct." (380 U.S. at 491-492) [Emphasis supplied]

The Dombrowski principle is summed up in forthright language (p. 494) taking note of life's realities and the fact that not all men are willing to accept martyrdom. It reads:

> [fol. 75] "So long as the statute remains available to the State the threat of prosecutions of protected expressions is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression."

Once the thesis is accepted that § 781(b) is invalid at least for overbreadth in its indiscriminate application to both the constitutionally protected writing which, though anonymous, may be circulated without penalty, and that which by reason of malicious falsehood must certify its origin or be in violation, the question arises as to the one who shall so assess the contents and at what stage this shall be done. For answer § 781(b) must be read in association with Executive Law § 69. That provision at the same time authorizes as it obligates, the Attorney General to investigate crimes against the Elective franchise. The sifting

process which he, through his deputies, engages in, to implement § 781(b) in its judicially narrowed dimension, may with all good heart be intended only for the culpable. Its chill will, nevertheless, be felt in a prior restraint by those whose writings, though not self-identified, may be emitted freely, and should be, not only without penalty, but equally without fear of penalty. Chilling that freedom is impermissible censorship. See People v. Clampitt, 34 Misc.2d 766; North End Democratic Club v. Attorney General, 31 Misc.2d 1000; People v. Zwickler, (Crim. Ct., N.Y.City, Kings Co., Feb. 10, 1965, unreported) "[j]udgment of conviction unanimously reversed on the facts," (Sup. Ct., [fol. 76] App. T., 2d Dept., April 23, 1965, unreported), aff'd without opinion 16 N.Y.2d 1069 (1965).

Justice Black in Talley at p. 539 cites as significant Hallam's Constitutional History of England and the Letters of Junius. The organ tones of Milton two centuries earlier in Areopagitica provide the wellsprings at which these authors surely drank.

"For who knows not," the mighty advocate asked, "that Truth is strong next to the Almighty?" and gave his own answer. "She needs no policies, no stratagems, nor licensings to make her victorious; those are the shifts and the defences that error uses against her power."

I would grant the plaintiff's motion declaring § 781(b) unconstitutional as in violation of the First and Fourteenth Amendments to the Constitution of the United States and enjoining its enforcement.

George Rosling, U. S. D. J.

[fol. 77]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket #66 Civ. 375

[Title omitted]

NOTICE OF APPEAL—Filed October 28, 1966

SIR:

I. Notice is hereby given that the above named plaintiff hereby appeals to The Supreme Court Of The United States from the order of the United States District Court (statutory three-judge court) for the Eastern District of New York filed on September 29, 1966, which denied the application of plaintiff for a temporary injunction and granted the application of the defendant dismissing the complaint. This appeal is taken pursuant to 28 U.S.C. Section 1253.

II. The clerk of this court will please prepare and transmit to the Clerk of the Supreme Court of the United States, and include in said transcript, the following:

1. This Notice of Appeal and proof of service thereof;
2. The order of the statutory three-judge court;
3. The opinions of Judge Irving Kaufman, Chief Judge Joseph C. Zavatt and Judge George Rosling;
4. The amended complaint;
5. The Notice of Motion of the plaintiff;
6. The Notice of Motion of the defendant;

[fol. 78] 7. The affidavit of Irving L. Rollins, sworn to May 3, 1966 in support of defendant's motion to dismiss;

[File endorsement omitted]

8. The order of Hon. George Rosling dated May 25, 1966 directing the convening of a statutory three-judge court;

9. The opinion of Hon. George Rosling upon granting plaintiff's motion to convene a statutory three-judge court.

III. The following questions are presented by this appeal:

1. Is Section 781-b of the Penal Law of the State of New York repugnant to the Constitution of the United States as a restraint upon expression?

2. Should the amended complaint have been dismissed by the District Court without passing upon the merits of plaintiff's constitutional claim that the said statute was repugnant to the Constitution?

Dated: New York, New York, October 4, 1966.

Emanuel Redfield, Attorney for Plaintiff, Office & P. O. Address, 60 Wall Street, New York 5, New York, HAnover 2-1023.

[fol. 79] Certificate of Service (omitted in printing).

[fol. 80] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 81]

SUPREME COURT OF THE UNITED STATES

No. 810, OCTOBER TERM, 1966

SANFORD ZWICKLER, Appellant,

v.

AARON E. KOOTA, as District Attorney of the County of Kings.

Appeal from the United States District Court for the Eastern District of New York.

ORDER NOTING PROBABLE JURISDICTION—February 13, 1967

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 29

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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APPENDIX "A" A1

APPENDIX "B" A17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 29

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

This is an appeal from an order of a three-judge court of the United States District Court for the Eastern District of New York denying a motion by appellant for injunctive and declaratory relief and granting the motion by appellee to dismiss the complaint (R. 34).* Appellant sought to enjoin the enforcement against him of the New York statute prohibiting the distribution in quantity of anonymous campaign literature (R. 5). His motion for a three-

* Numbers in parentheses preceded by the letter "R" refer to pages in the printed record before this Court.

judge district court was granted on May 20, 1966 (R. 12-15) and the order of that Court dismissing the complaint is dated September 29, 1966 (R. 34). This Court noted probable jurisdiction on February 13, 1967 (R. 47).

Opinions Below

The opinion granting the motion to convene a three-judge court (R. 12-15) is not reported. The opinion of the three-judge District Court by Chief Judge ZAVATT is reported at 261 F. Supp. 985 (R. 19-33). The concurring opinion of Court of Appeals Judge KAUFMAN is at 261 F. Supp. 993 (R. 35-37). The dissenting opinion of Judge ROSLING is at 261 F. Supp. 994 (R. 38-44).

Jurisdiction

Appellant has invoked the jurisdiction of this Court under 28 U.S.C. § 1253.

Statutes Involved

At the time of the commencement of this action the applicable statutes were N. Y. Penal Law § 781-b and § 782. The statutes are reproduced at pages 2-3 of appellant's brief. Effective September 1, 1967, these statutes became, without change, N. Y. Election Law §§ 457 and 458 respectively. They will hereinafter, for the sake of accuracy, be referred to as N. Y. Election Law §§ 457 and 458.

Questions Presented

1. Did the District Court abuse its discretion in declining equitable relief to enjoin the enforcement of a state criminal statute where the statute is not vague or over-

broad, where appellee, charged with its enforcement, is conceded to act in good faith and where no other special circumstances exist to remove this case from the rule of *Douglas* v. *City of Jeannette*, 319 U. S. 157?

2. Is New York Election Law § 457, prohibiting the distribution in quantity of anonymous campaign literature, an impermissible limitation on freedom of expression?

Statement of the Case

Alleging that he "desires and intends to distribute in quantities of more than a thousand copies" anonymous political leaflets with regard to the election campaign of 1966 "and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966" (Amend. Compl. par. 14 [R. 3-4]), appellant brought this action to declare the statute prohibiting such activity unconstitutional and to enjoin appellee from enforcing the statute against him (R. 5). He alleges that he wishes to make such distribution of a leaflet "prepared by and at the instance of a person other than the plaintiff" (Amend. Compl. par. 14 [R. 3]) because of his belief that the statute forbidding such distribution violates the First and Fourteenth Amendments to the Constitution "in that it is an infringement of the freedom of expression" (*id.* par. 16 [R. 4]).

The complaint seeks federal relief enjoining enforcement of the statute not because the statute is vague or overbroad, not because appellant is being subjected to harassment of any sort and not because any prosecution is pending or imminent. Rather, he asks federal intervention because "[t]he said leaflet is embraced within the scope and intendment of the statute" (*id.* par. 17 [R. 4]), because appellee "is a diligent and conscientious public officer

and pursuant to his duties intends or will again prosecute the [appellant] . . . for his acts of distribution" (*id.* par. 18 [R. 4]) and because, in 1964, appellant was charged with distributing an anonymous leaflet in connection with the Congressional election to be held on November 3, 1964, about four days after the date of distribution (*id.* pars. 5-6 [R. 2]). He was found guilty after a trial at which he presented no evidence. *People* v. *Zwickler* (Crim. Ct. N.Y.C. Kings Co. Feb. 10, 1965, unreported) (*id.* pars. 7-9 [R. 3]). The judgment of conviction was "unanimously reversed on the facts" upon the failure of the People "to establish that defendant distributed anonymous literature 'in quantity'." *People* v. *Zwickler* (Sup. Ct. App. Term, Kings Co. April 23, 1965, unreported) (*id.* pars. 10-11 [R. 3]). The reversal was affirmed without opinion by the New York Court of Appeals. *People* v. *Zwickler*, 16 N. Y. 2d 1069, 266 N.Y.S. 2d 140 (1965) (R. 3). Appellant thus seeks federal intervention with enforcement of a state statute because of his fear of future prosecution under a statute whose scope he comprehends by an officer he regards as "diligent and conscientious" after a previous unsuccessful prosecution.

The District Court declined to intervene. Holding that the amended complaint stated a claim under 28 U.S.C. § 1343(4) and alleged a case or controversy within its adjudicatory power, the Court recognized that "[t]he fact that a case is within the adjudicatory power of this court does not necessarily require that its power be exercised" (R. 23). Both Judges Zavatt and Kaufman found that none of the special circumstances in *Dombrowski* v. *Pfister*, 380 U. S. 479, justified departure from the rule of *Douglas* v. *City of Jeannette*, 319 U. S. 157. "There is no suggestion that the alleged threatened prosecution of the plaintiff in the instant case will be undertaken in bad faith or that the plaintiff's defense to any such prosecution will not assume him adequate vindication of his alleged constitu-

tional rights" (R. 30). Moreover, the Court found that if appellant did not wish to await criminal prosecution, he could institute an action in the state for a declaratory judgment. N. Y. CPLR § 3001. Courts of Appeals Judge KAUFMAN, in his concurrence, also noted that no extensive adjudication would be required to settle appellant's claim and that relief could be as swift in the state as in the federal courts (R. 37).

Judge ROSLING, in his dissent, called the law in question "overbroad" (R. 39) and said that abstention is inappropriate in that it would require "slow, particularistic" litigation (R. 41) in the state courts. He concluded that, under *Dombrowski*, the statute had a "chilling" effect requiring a federal court to declare it unconstitutional.

Summary of Argument

This Court has long recognized the principle that federal courts will not exercise their equitable jurisdiction to enjoin the enforcement of state criminal statutes absent a showing of irreparable injury. This principle applies even to cases arising under the First Amendment. Appellant failed to show such injury to himself in this case and thus did not bring himself within the holding of *Dombrowski* v. *Pfister*, 380 U. S. 479. The statute in question, New York Election Law § 457, regulating the distribution of anonymous campaign literature, is neither vague nor overbroad. Indeed, appellant claimed that his projected activity would fall within the meaning of that statute. The constitutionality of the statute can be swiftly determined in a single state court litigation and there is no showing that such adjudication would be unduly delayed. Moreover, appellant need not wait to be criminally prosecuted since he may seek a declaratory judgment in the state courts. There is no showing that appellant has been

harassed or that any prosecution would be undertaken in bad faith.

In any event, there is no merit to appellant's contention that Election Law § 457 is an unreasonable restraint of free expression. There is a substantial need for the legislation, the legislation is no broader than the need it serves, and no undue prejudice can result from the required limited disclosure. The statute protects the integrity of the electoral process by facilitating the enforcement of various anti-corruption provisions in the New York Election Law requiring reports of campaign receipts and expenditures. Moreover, in an election situation, where the public is being asked to take a definite course of action, it is entitled to know who is urging one position or another and what campaign tactics are being employed by each side. Time is of the essence in an election campaign. Not all charges and countercharges can be answered before the election but the public must at least be able to evaluate for itself any statement made in the light of its source. The New York experience, as outlined in the report of the Special Committee on Campaign Practices, demonstrates the necessity for the legislation.

By limiting itself to the campaign context, the New York statute is unlike the broad disclosure statutes previously struck down by this Court. The limitation of the statute is demonstrated by the fact that none of the well-known anonymous literature of the past falls within its proscription. Furthermore, appellant has not demonstrated any realistic possibility of reprisal resulting from disclosure. Libel and invasion of privacy suits by public officers are now limited in all but the most outrageous cases and there is no proof that disclosure would result in harassment of individuals for their associations or that disclosure is being sought for that purpose.

POINT I

The District Court properly exercised its equitable discretion in declining to enjoin state enforcement of its statute.

The principle that federal courts will not exercise their equitable jurisdiction to enjoin the enforcement of state criminal statutes without a showing of irreparable injury in the absence of such intervention is now a firmly established tenet of our jurisprudence. *Fenster* v. *Leary*, 264 F. Supp. 153 (S.D.N.Y.), *aff'd.* 386 U. S. 10; *Dombrowski* v. *Pfister*, 380 U. S. 479; *Stefanelli* v. *Minard*, 342 U. S. 117; *Douglas* v. *City of Jeannette*, 319 U. S. 157; *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45; *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89; *Fenner* v. *Boykin*, 271 U. S. 240. As this Court said in *Douglas* v. *City of Jeannette*, *supra* at 163:

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction."

Where orderly state process is available to test a claim of constitutionality, respect for federalism requires that the question be adjudicated in the state subject to review by this Court:

> "[F]ederal interference with a State's good-faith administration of its criminal law is peculiarly inconsistent with our federal framework. It is generally

to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." *Dombrowski* v. *Pfister, supra* at 484-85.

This principle of non-intervention applies to cases raising claims under the First Amendment (*Douglas* v. *City of Jeannette, supra; cf. Cameron* v. *Johnson,* 381 U. S. 741) and this case provides a striking illustration of why this Court should not adopt the hard and fast rule suggested by appellant and *amicus* that the mere claim of a First Amendment violation renders the principle inapplicable. Equity, proceeding on a case-by-case basis, is fully adequate to protect First Amendment rights while maintaining principles of federalism. Analysis of the instant complaint shows no special circumstances necessitating extraordinary relief.

In only one case has this Court held that the principles of *Douglas* v. *City of Jeannette, supra,* required intervention in the enforcement of a state criminal statute. That case, *Dombrowski* v. *Pfister, supra,* embodied virtually all the elements which this Court previously suggested would mandate intervention and presented peculiar and outrageous facts of its own. In *Dombrowski,* the statute was vague and overbroad thus "chilling" free expression and rendering impossible the resolution of the constitutional questions in a single state prosecution. Moreover, the record, supported by affidavits and a written offer of proof portrayed a history of prosecution raids at gunpoint in the offices and homes of civil rights organization members, the seizure of files and books, and the continued prosecution of appellants after motions to suppress the seized evidence were granted for lack of probable cause. It

showed that harassment had frightened off potential organization members and it showed that the threatened prosecutions were merely part of a scheme of future prosecution under other statutory provisions of state law. It indicated that even with a series of state criminal prosecutions there was no certain or immediate prospect that appellants could have satisfactorily resolved all the constitutional issues in the state courts within a reasonable time and without undue harassment. The instant case, by contrast, presents neither a vague and overbroad statute limiting free expression, nor the possibility of protracted piecemeal state court litigation, nor any question of the statute being used as a weapon to harass appellant or anyone else.

New York Election Law, Section 457 is specifically directed against certain described literature "concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election . . ." without including the printer and the person or committee placing the order. The complaint did not allege that the statute is overbroad and vague. Indeed it alleged that the distribution which appellant desired to make was "within the scope and intendment of the statute" (Amend. Compl., par. 17 [R. 4]). The complaint described the course of action which appellant intended to pursue and alleged that that course would violate the New York statute. Appellant voiced no difficulty in understanding the statute and he did not suggest that it was susceptible to a variety of interpretations which left him in confusion as to his rights.

Apparently recognizing that in order to secure federal intervention and to circumvent the rule of *Douglas* v. *City of Jeannette, supra,* the statute under attack must be at least allegedly vague, *amicus* attempts to inject vagueness into the statute, making far more of a claim for the confusion and uncertainty of appellant than appellant

makes for himself. Thus, *amicus* contends that the statute is vague because it does not define the term "in quantity". The objection is frivolous. Appellant himself sets a figure which he regards as a "quantity" and, in any event, the minimum limit can be immediately and precisely determined by state judicial definition. Moreover, the question of number bears no relation to the nature of the language sought to be uttered. *Amicus* further suggests that the term "in connection with" is impermissibly vague because it leaves undefined the time within which the anonymous circulation may be made. *Amicus* alleges, wholly gratuitously since appellant does not so allege, that "[a]ppellant had to guess whether he was within the time perimeter described by 'in connection with any election'" (Br. *amicus curiae,* p. 6). In fact, appellant alleges with respect to time, only that the distribution for which he was prosecuted occurred four days before the 1964 election (Amend. Compl., par. 6 [R. 2]). The statutory limitation, relating as it does to the specific fact of an *election,* is not at all vague. The New York Election Law, like the laws of other states, contains provisions for commencing the election machinery, including the designation of candidates for nomination and election with time limits for the filing of the required petitions and certificates. N. Y. Election Law §§ 131-133, 139, 143. Once more, the term can, if necessary, be defined in a single state adjudication and, once more, the alleged vagueness does not relate to any confusion as to what speech is proscribed. In short, the attempt by *amicus* to establish collateral areas of vagueness is wholly unavailing. It seems only reasonable that, if a *per se* rule is sought requiring federal intervention with respect to First Amendment claims, and that if one of the allegations with respect to the statute is that it is vague, then it is fair to require that the alleged vagueness relate somehow to the question of free expression.

Appellant suggests (Br., pp. 17-18) that if the statute is to be limited to libelous publication or matter which is

false, then the question of the meaning of the statute becomes very serious. This question is not before the court since the statute, by its terms, does not attempt to assess the nature of the language published and does not promulgate any standards other than that of anonymity. The statute applies to all anonymous campaign literature.

The dissent in the court below considered the statute to be overbroad but rested that feeling on a belief that the statute definitely regulated an area protected by the First Amendment. That is, it considered the statute overbroad only in the sense that any unconstitutional statute invades a constitutionally protected area. However, in order to produce the chilling effect held in *Dombrowski* to raise the possibility of intervention, overbreadth must be regarded as an aspect of vagueness and the "chill" described in that case is the chill of uncertainty of the scope of the statute.

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, *e.g.*, *Smith* v. *California*, 361 U. S. 147. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights." *Dombrowski* v. *Pfister*, *supra* at 486.

In such cases the scope of the statute is uncertain. Consequently, it cannot be determined whether or not the utterance in question is covered by the statute and this confusion leads, in turn, to the chilling of protected expression.

In the instant case the scope of the statute is clear and the extent of its regulation creates no uncertainty.

Thus, the "chill" created by alleged vagueness and overbroadness is not present and presents no reason for enjoining the statute in question. Although the District Court spoke in terms of "abstention" it obviously did not decline to act because of any uncertainty as to the meaning of the state statute (see *e.g., Baggett* v. *Bullitt,* 377 U. S. 360; *Harrison* v. *N.A.A.C.P.,* 360 U. S. 167) but because of appellant's failure to demonstrate any ground for equitable relief. *Douglas* v. *City of Jeannette, supra.*

Because Election Law, Section 457 is not vague and overbroad, its constitutionality can be swiftly determined in a single state court litigation. While protracted delay in state adjudication is a factor to be considered in determining whether or not equitable intervention is required, *Beal* v. *Missouri Pac. R. Co., supra,* there is no showing in this case that there would be any unreasonable delay in state adjudication of the issue. It appears to be appellant's contention that, having decided to seek relief in the federal courts, he must be accorded that relief since, if it were determined that the state courts were the proper forum "he would be in the same posture as in the district court" (Br., p. 29). In other words, appellant attributes to his own improper choice of forum an unconstitutional delay in state adjudication. This merely demonstrates the paucity of his argument that the state will delay his securing an adjudication.

Illustrative of the fact that the state does not institutionalize delay is the case of *Fenster* v. *Leary,* 264 F. Supp. 153 (S.D.N.Y.), *aff'd.* 386 U. S. 10. In that case, Fenster, having first sought a writ of prohibition against enforcement of the New York vagrancy statute in the state courts, and having appealed through the New York Court of Appeals the question of the appropriateness of prohibition as a remedy to test a statute, sought and obtained a three-judge court on the question of the constitutionality of the New York vagrancy law. That court, like the court

below in the instant case, declined to intervene in the state courts' enforcement of their criminal laws and this Court affirmed that decision. Fenster then sought a declaratory judgment in the state courts pursuant to New York Civil Practice Law and Rules, Section 3001. He was denied relief in the lower court but, on direct appeal to the New York Court of Appeals pursuant to N. Y. CPLR, Section 5601(b)(2), the statute was declared unconstitutional. *Fenster* v. *Leary*, 20 N. Y. 2d 309. The total time from the filing of the federal petition in *Fenster* to the decision of this Court was about eight months, from June 29, 1966 to February 20, 1967. The total time consumed in the declaratory judgment proceeding in the state courts was less than five months, from February 13, 1967 to July 7, 1967. Similarly the total time involved in the criminal prosecution in which this appellant's conviction was reversed was one year and one month from October 29, 1964 to December 1, 1965 (R. 2-8). The instant proceeding was commenced by a complaint filed May 3, 1966, about a year and a half ago and, of course, has yet to be resolved. Any complaint of unreasonable delay in the state courts requiring intervention by the federal courts is, thus, absolutely unfounded.

Nor must appellant become, as he suggests (Br., p. 21), a martyr to his principles. First, while he repeatedly raises the spectre of a felony conviction for a second offense, his conviction having been reversed, he stands in danger only of a good faith prosecution for a misdemeanor in order to test the statute. The "imminence" of a criminal prosecution is not alone a ground for federal equity relief. *Douglas* v. *City of Jeannette, supra* at 163-64. Second, of course, appellant is not confined, in the state courts, to awaiting a criminal prosecution. As *Fenster* v. *Leary, supra,* makes abundantly clear, there is a remedy at law, the declaratory judgment. As the State Appellate Division said in *DeVeau* v. *Braisted,* 5 A. D. 2d 603, 607, 174 N.Y.S. 2d 596, 600 (2nd Dept.), *aff'd.* 5 N. Y. 2d 236,

aff'd. 363 U. S. 144, in upholding the use of a declaratory judgment to test the validity of a penal statute:

> "One of the very purposes of a declaratory judgment is to settle a serious question of law as to the validity of a statute which would be the basis of a threatened prosecution for crime, without requiring, as a prerequisite to judicial entertainment of the question, that interested parties first commit the very acts which are involved in the dispute and thereby run the risk of such prosecution. . . ."

See also *Bunis* v. *Conway,* 17 A. D. 2d 207, 234 N.Y.S. 2d 435 (4th Dept.), *app. dism.* 12 N. Y. 2d 882; *Bookcase, Inc.* v. *Broderick,* 49 Misc. 2d 351, 267 N.Y.S. 2d 410 (Sup. Ct., N. Y. Co.). These both sustained the use of declaratory judgment to test the constitutionality of penal statutes that were attacked as infringing First Amendment rights. Appellant's claim that declaratory judgment is "discretionary" is meaningless. It is no more discretionary than any equitable remedy. See *Fenster* v. *Leary,* 20 N. Y. 2d 309, *supra.*

Nor does the complaint allege that any prosecution would be in bad faith for the purpose of harassment. In striking contrast to the situation in *Dombrowski* v. *Pfister, supra,* this case presents a "diligent and conscientious public officer" (R. 4) who would, if he undertook any prosecution at all undertake a good faith prosecution. Certainly the previous prosecution does not denote bad faith nor does appellant suggest that it does. The appellant in *Fenster* v. *Leary, supra,* had been prosecuted three times. But the facts there, and the facts here, give no intimation of any program of harassment which would make resort to the state courts an insufficient means of protection.

Appellant suggests that the fact that he is alleging a First Amendment violation makes federal equitable relief a necessity because otherwise he will be denied free ex-

pression during the period of any prosecution which might be undertaken. He overlooks the simple fact that he would be in the same position in the federal courts unless he obtained a temporary injunction pending the outcome of his case. Not only is such relief available in the state courts too (CPLR, Section 6301), but also the logic of appellant's position is that not only must the federal courts intervene in all cases where it is alleged that state penal laws violate the First Amendment, but temporary injunctions must be issued in all such cases. This is indeed drastic relief where, as here, it is conceded that the state officers involved would proceed in good faith, and it is obvious that state processes are adequate to cope with the issue raised and that no undue delay would be involved.

By attempting to substitute a rigid *per se* rule with respect to First Amendment cases for the more responsive equity rule, appellant would completely recast the role of federal equity jurisdiction and alter its position in our federal system. This Court has thus far declined to revamp the system. (*Cameron* v. *Johnson, supra; Dombrowski* v. *Pfister, supra*) and certainly this case indicates no need to do so. *Evers* v. *Dwyer*, 358 U. S. 202, does not require a different result. In that case it was held that the arrest and potential re-arrest of appellant gave him standing to assert the issue of the constitutionality of the statute and thus created a case or controversy. This Court thus reached only the question of jurisdiction and not whether that jurisdiction should be exercised. The question in this case arises only after a finding of jurisdiction. It being clear that the state courts are fully capable of deciding the issue here presented, the District Court did not abuse its discretion in denying federal relief.

POINT II

New York Election Law, Section 457, passed pursuant to the state power to regulate the conduct of elections, is not an unconstitutional restraint of freedom of expression.

Because it found no basis for equitable relief, the District Court did not consider the merits of appellant's claim that New York Election Law § 457 violates his right to freedom of expression. This disposition was entirely proper. If, however, this Court should adopt the rule urged by appellant, then it is clear that the statute, prohibiting the distribution of anonymous campaign literature is a necessary implementation of the state's duty to regulate the election process and does not constitute an unreasonable restraint of free expression. In assessing a statute like Section 457, three factors must be weighed. The first is whether or not there is a legitimate state purpose in enacting the legislation and a substantial need for it. *American Communications Association* v. *Douds,* 339 U. S. 382; *Schneider* v. *State,* 308 U. S. 147, 161. The second consideration is whether or not there is a "substantial connection between the breadth of disclosure demanded and the purpose which disclosure was asserted to serve". *Communist Party of the United States* v. *Subversive Activities Control Board,* 367 U. S. 1, 93; *Shelton* v. *Tucker,* 364 U. S. 479. The third factor, a necessary corollary of the second, is whether or not the statute involves an unnecessary restraint on free expression and whether disclosure might unduly prejudice those of whom disclosure was required. *Communist Party of the United States* v. *Subversive Activities Control Board, supra; American Communications Association* v. *Douds, supra.*

In applying this test, this Court has consistently upheld limited disclosure statutes serving a strong governmental

interest. *Communist Party of the United States* v. *Subversive Activities Control Board, supra; United States* v. *Harriss,* 347 U. S. 612; *Poulos* v. *New Hampshire,* 345 U. S. 395; *American Communications Association* v. *Douds, supra; Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288. The New York statute completely satisfies all of the requirements enunciated by this Court in sustaining legislation which is challenged on First Amendment grounds.*

New York Election Law, Section 457 is carefully limited to anonymous campaign literature. It is not directed at all literature printed any time under any circumstances. *Talley* v. *California,* 362 U. S. 60; *Jamison* v. *Texas,* 318 U. S. 413. It does not restrict the circulation of anonymous literature dealing with ideas or even with current issues. See *Canon* v. *Justice Court,* 39 Cal. Rptr., 228, 393 P. 2d 428, 431. It is directed solely at literature respecting candidates and propositions on the ballot. It requires only that the printer and author or sponsor be identified on literature circulated in quantity to influence the electorate in their choice. The statute serves the legitimate state purposes of insuring the purity of the electoral process (*Burroughs and Cannon* v. *United States,* 290 U. S. 534) and promoting the intelligent use of the ballot. *Katzenbach* v. *Morgan,* 384 U. S. 641; *Lassiter* v. *Northampton County Board of Elections,* 360 U. S. 45.

The statute protects the integrity of the electoral process first by facilitating the enforcement of various anti-corruption provisions in the Election Law. These include, for example, New York Election Law §§ 320-328 with

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* To the extent that other theories have been advanced for the weighing of First Amendment claims, Election Law, Section 457 satisfies the requirements of those tests as well. See *e.g.,* EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (N. Y. 1966), pp. 104-105 and "The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil," 70 Yale L. J. 1084 (1961).

respect to requirements for filing reports on campaign receipts, expenditures and contributions, § 447 respecting political assessments, § 454 respecting contributions from judicial candidates and § 460 respecting campaign contributions from corporations. To the extent that these sections might be circumvented by the expenditure of funds on anonymous literature, § 457 operates to prevent such a possibility. In this respect it is very similar to the federal provision, 18 U.S.C. § 612, which also was enacted to enforce other provisions of the Federal Corrupt Practices Act. 2 U.S.C. §§ 241-256. See S. Rep. No. 1390, 78th Cong., 2d Sess., 2 (1944) Letter from Francis Biddle, Atty. Gen. to Chairman of Sen. Jud. Com. (April 7, 1944).

The second important interest served by Section 457 is the right of the public to identify the sources urging it to follow a certain course with respect to an election and the concomitant ability to evaluate material in light of the sources. It cannot be denied that disclosure of the source of information is an important factor in ascertaining the weight to be given any particular proposal. This is especially true in the modern era of mass communications.

> "As the market place changed from quill and parchment to printing press, camera and vacuum tube, the testing of truth increasingly required disclosure of the writer and of the source of financial support of the media of communication. The historic anonymity of the author is not be analogized with the anonymity of the dissemination of ideas in the vast quantities presently possible. Perhaps in more leisurely times the theory that ideas might be evaluated by themselves was a practicable one. In these hectic days when the facts upon which action must be based are numerous and, in many cases, understandable only by experts, the busy citizen has neither the time nor the faculties to analyze each idea presented to him and must,

therefore, depend upon the status and reputation of those who espouse it". Ernst and Katz, "Speech: Public and Private", 53 Col. L. Rev. 620, 623 (1953).

The importance of being able to identify the source of material is particularly urgent in an election context. As opposed to a general and continuing debate on issues, an election requires the taking of a position with respect to questions of grave importance in a severely limited period of time. Cf. 70 Yale L. J. *supra* at 1115, n. 194. In a situation where action is required, the public is entitled to know all of the relevant factors, including who supports and who opposes a particular candidate, before it can be requested to choose among them. This is the rationale of the Federal Regulation of Lobbying Act and is applicable equally to the election process. As this Court said in *United States* v. *Harriss, supra* at 625:

> "Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myraid pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. . . .
>
> Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from this who for hire attempt to influence legislation or who collect or spend funds for that purpose."

See also *Canon* v. *Justice Court, supra* at 431; *United States* v. *Scott,* 195 F. Supp. 440 (N. Dak.) (upholding the federal law 18 U.S.C. § 612); *Commonwealth* v.

Evans, 156 Pa. Super. 321, 40 A. 2d 137; *State* v. *Freeman,* 143 Kan. 315, 55 P. 2d 362. The purpose of identification in no way depends upon the nature of the material printed since the right to know in an election situation embraces the right to know who is speaking in favor of as well as who is opposing a candidate, and who is campaigning with ideas as well as with invective. See also *Lewis* v. *Morgan Publishing Co., supra* at 312. Appellant's assertion that the source of a statement is not necessary to an evaluation of its truth, overlooks the fact that campaign literature often deals not in statements of truth or falsity, but in emotional appeals which contain not facts and not ideas but personal factors which may create as strong an impression as a statement relating to the issues in the campaign. Identification of the source of this material would help the public to assess whether or not that source is so potent or important a figure or committee on the side espoused that it wishes to retaliate at the polls. Moreover, of course, the faceless adversary in an election campaign, as in a courtroom, cannot be subjected to public questioning with respect to his position.

Not only does publication of literature with respect to a campaign pressure the public to take sides without providing for the information as to the source of the pressure, but it does so within a period of time which makes it difficult, if not impossible, to ascertain the source before the choice must be made. This is an impermissible imposition both on the public and on the candidates.

This Court has long recognized that time is of the essence in an election campaign. *Mills* v. *Alabama,* 384 U. S. 214, 220. In that case the Court recognized that a law which made it a crime in effect to answer "last minute" charges on Election Day was unconstitutional because that was "the only time they can be effectively answered. Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate 'from con-

fusive last-minute charges and counter charges.'" See also *Anderson* v. *Martin*, 375 U. S. 399, 402; *American Communications Association* v. *Douds, supra* at 406. The question of identification after the election is completely irrelevant to the determination which the public must make with respect to the election and to the answers which the candidate must make with respect to any charges, innuendoes or emotional appeals.

Nor is the statutory refusal to sanction anonymous campaign literature purely hypothetical or academic. The New York statute, like the federal statute and the statutes of 36 sister States* is rooted in experience. New York Election Law, Section 457 was enacted in 1962 as an amendment to New York Penal Law, Section 781-b. The original Section 781-b dealt only with printing anonymous campaign literature and was the result of anonymous appeals to ethnic background and other personal factors in the 1940 Presidential election campaign. The 1962 amendment to

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* ALA. CODE tit. 17, § 282 (1940); ALASKA STAT. § 15.55.030 (1962); ARK. STAT. § 3-1412 (1947 Ann.); CAL. ELECTIONS CODE § 12047-49 (1965); COLO. REV. STAT. § 49-21-50 (1963 Ann.); FLA. STAT. ANN. § 104.37 (Supp. 1966); IDAHO CODE ANN. § 34-104 (1953); ILL. ANN. STAT. ch. 47, §§ 26-1.3 (1963); IOWA CODE tit. 35, § 738.22 (1966); KAN. STAT. ANN. § 25-1714 (1913); KY. REV. STAT. §§ 123.095, 123.130 (Supp. 1966); LA. REV. STAT. § 18:1531 (1950); ME. REV. STAT. ANN. tit. 21, § 1575 (1964); MD. CODE Art. 33, § 221 (1957); MASS. ANN. LAWS ch. 56, §§ 39, 41 (1952); MICH. STAT. ANN. § 6.1914; MINN. STAT. § 211.08 (Supp. 1963); MO. REV. STAT. tit. 9, § 129.300 (1939); MONT. REV. CODES § 94-147S (1947); NEB. REV. STAT. § 32-1131-33 (Supp. 1965); N. H. REV. STAT. tit. IV, § 70.14 (Supp. 1965); N. J. STAT. ANN. §§ 19:34-38.1-4 (1963); N. D. CENTURY CODE § 16-20-17.1 (1959); OHIO REV. CODE § 3599.09 (Supp. 1966); ORE. REV. STAT. tit. 23, chap. 268, § 260.360 (1955); PA. STAT. ANN. tit. 25, § 3546 (1933); R. I. ELECTION LAW § 17-23-2 (1923); S. D. CODE 1939 § 16.9930 (Supp. 1960); TENN. CODE § 2-2238 (1955); TEX. ELECTION CODE Art. 14.10 (1951); UTAH CODE § 20-14-24 (1953); VT. STAT. ANN. tit. 17, chap. 35, § 2022 (1963); VA. CODE 1950 § 24-456; WASH. R.C.W.A. § 29, 85.270 (1965); W. VA. CODE 1961, chap. 3, § 218(6) (a-b) (Supp. 1965); WIS. STAT. ANN., tit. II, chap. 12, § 12.16 (1911).

the statute was the direct outgrowth of an investigation into the charges and counter charges hurled during the 1961 Mayoralty Democratic Primary campaign in New York City. The two principal candidates for the Democratic nomination for Mayor, the incumbent, Robert F. Wagner, Jr. and State Comptroller Arthur Levitt each charged that anonymous literature was being circulated by his opponent.

Wagner headquarters charged that the regular Bronx Democratic organization circulated a packet of literature implying that the Mayor was a "Communist puppet" and the Levitt headquarters charged that Sanitation Department employees in Queens distributed an anonymous anti-Semitic leaflet against the Comptroller. An investigation was conducted by a Special Assistant Attorney General who was counsel to the New York Fair Campaign Practices Committee and attorneys of standing independently selected, who served without compensation (A4). The investigation was conducted with the cooperation of the National Fair Campaign Practices Committee, Inc. The investigation committee submitted an interim report annexed hereto as Appendix "A" and a final report annexed hereto as Appendix "B". It was established that the Wagner charge that the regular Democratic organizations in the Bronx and Brooklyn circulated the "Communist puppet" literature was true (A3, A18). That literature was characterized by one of the persons involved in the circulation as "brilliant" in conception. He said that the distribution was dictated by "politics" and that "we were fighting for our political life" (A7).

An examination of the records of the Club circulating the literature disclosed no evidence of expenditures for the printing of such literature (A19). Moreover, a major portion of the 1961 Primary campaign receipts of the Club in question were not recorded and neither the Treasurer nor any person associated with the political committee for the

District had filed a financial statement with the Secretary of State as required by Section 324 of he Election Law, nor had a statement been filed identifying the Treasurer of the Committee as required by Section 325 of the Election Law and most important, Section 327 of the Election Law requiring the Treasurer of a political committee to maintain a detailed account of campaign receipts and expenditures including a receipted bill stating the particulars of each expense had not been compled with (A22-A23). The charge that Wagner workers had distributed an anti-Semitic leaflet was not established (A3, A18). Indeed, the source of the anti-Semitic literature was never established. Expert printers informed the investigators that the anonymous leaflets had been printed by an unskilled and inexperienced person and Wagner headquarters felt that the circular was an "opposition plant" (A14).

The Committee recommended the removal of the "cloak of anonymity" (A29-A32), recommending that Section 781-b of the Penal Law be amended to prohibit printing, publishing or distributing of anonymous campaign literature or causing such literature to be printed, published or distributed. They also recommended that the literature be required to bear the name and address of the printer and the person and organization ordering the material. The recommendations of the Committee were, for the most part, incorporated in the revised legislation. The new statute was supported by the National Fair Campaign Practices Committee, the Association of the Bar of the City of New York, the Citizens' Union and the Democratic, Republican and Liberal parties.

The exact impact of anonymous literature on opinion cannot, of course, be precisely assessed. However, it is a well-known phenomenon that the printed word carries an impact of its own which tends to incline the recipient of literature in the suggested direction, even if the literature is anonymous. See WAPLES, BERELSON AND BRADSHAW,

WHAT READING DOES TO PEOPLE: A SUMMARY OF EVIDENCE ON THE SOCIAL EFFECTS OF READING AND A STATEMENT OF PROBLEMS FOR RESEARCH (1940), pp. 108-109. This fact has even been demonstrated in the area of campaign literature where it was found that an anonymous leaflet on a controversial subject tended to change the opinion of the recipient of that leaflet in the direction of the position it advocated. Dietsch and Gurnee "The Cumulative Effect of a Series of Campaign Leaflets", 32 Journal of Applied Psychology, 189, 194 (1948). A written communication will cause a change in opinion even if the source or author is one of "low-credibility". Low credibility may result from an author with an antagonistic view or from anonymity. A person who has read the argument tends to disassociate the contents from the communicator. While he forgets the source, he remembers the text and his attitude is changed by it as long as he is not reminded of the source. HOVLAND, JANIS AND KELLY, COMMUNICATION AND PERSUASION: PSYCHOLOGICAL STUDIES OF OPINION CHANGE (1953), pp. 280-81. In an election context, of course, where the source is not identified, no one can be reminded of it.

The law thus arises out of a legitimate state purpose. Its need is amply demonstrated by the local and national history and its scope is no broader than the interest to be served since anonymity is the problem, not the utterance itself.

Appellant studiously avoids any discussion of the need for the legislation in question and the substantial State purpose which it serves. Instead he relies principally on the decision of this Court in *Talley* v. *California, supra,* which prohibited the dissemination in any place, under any circumstances, of any anonymous literature. In that case there was no need shown for the enactment of such a sweeping provision and no valid state interest was served in its enactment. However, as we have said, where a

valid state purpose is shown, this Court has upheld disclosure requirements. The most analogous situation to that in the instant case is that in *United States* v. *Harriss, supra,* in which this Court held that members of Congress had the right to know who was urging support for particular legislation. In an election situation where the choices are more varied and the issues more complex, the need is even more pressing to require such disclosure. Several states have upheld the constitutionality of such legislation based on the right of the public to know in an election campaign who is supporting and who is opposing a particular candidate. *Canon* v. *Justice Court, supra; Commonwealth* v. *Evans, supra; State* v. *Freeman supra.* Moreover, federal legislation, 18 U.S.C. § 612 has been upheld on the same grounds. *United States* v. *Scott, supra.*

Appellant's reliance on *Thomas* v. *Collins,* 323 U. S. 516 is wholly misplaced. In that case a statute requiring prior registration of a speaker was struck down. It cannot be said that one who presents himself in person to a group in order to deliver a speech is very anonymous. Even if his name is not revealed, his position can be questioned on the spot as can his associations. Moreover, the statute there was not directed at the election process and, indeed, a registration provision is, in general, wholly unlike a requirement of disclosure on the material circulated. Registration provisions very often vest in the registration official a discretion to regulate either the manner or content of the material being distributed. Such legislation is uniformly held to be unconstitutional. *Cantwell* v. *Connecticut,* 310 U. S. 296; *Schneider* v. *State, supra; Lovell* v. *City of Griffin,* 303 U. S. 444. However, the Court has indicated that a statute going no further than merely requiring previous identification with respect to an activity in which the state had a substantial interest would be sustained. *Thomas* v. *Collins, supra* at 539; *Cantwell* v. *Connecticut, supra* at 306. New York Election Law, Section 457 is not a registration statute. It contains no prohibition of any

kind against the free expression or publication of political literature and it does not require prior licensing or any other form of permission. It vests no discretion in any official to grant or withhold permission to print or distribute campaign literature. It requires only limited disclosure for the specific purpose of election campaigns.

Appellant's recital of the long history of anonymous literature serves merely to heighten the distinction between the limited New York statute and the broad provisions struck down in *Talley* v. *California, supra.* See also *Jamison* v. *Texas, supra* at 416. The most famous anonymous literature in American history, the Federalist papers, although they relate to a question on the ballot, were published in newspapers and consequently would not fall within the prohibition of Election Law, Section 457. See generally BLEYER, MAIN CURRENTS IN THE HISTORY OF AMERICAN JOURNALISM (1927), p. 102. Accordingly, appellant's concern about the professional standing of Alexander Hamilton and John Jay after the publication of these letters, is groundless (App. Br., p. 10). The letters of Junius appeared in the London Public Advertiser from 1769 to 1772. The publisher was prosecuted for seditious libel based on one of the letters which was addressed to the King and which protested the policies of the Government. The jury acquitted. BLEYER, *supra* at 23-27. These letters by their appearance in the newspaper would not fall within Section 457 if published in this country. Moreover, since they did not relate to any election campaign they would not have fallen within the statute even if they were circulated as anonymous hand bills. The letters of Cato appeared from 1720 to 1723 in British newspapers and were reprinted in colonial newspapers. They concerned theories of liberty and representative government. Once more not only did these letters appear in newspapers, but they were unrelated to any election campaign. BLEYER, *supra,* at 23, 55, 64. The trials of James Franklin and John Peter Zen-

ger would also not have fallen within the provisions of Election Law, Section 457. BLEYER, *supra* at 58-63.

The basic argument against a statute such as Election Law, Section 457 is the fear of reprisal. This is the theory of the argument to history most recently expressed in the majority opinion in *Talley* v. *California, supra.* Since the decision in that case, however, this Court has taken great strides in extending the First Amendment directly. *Associated Press* v. *Walker,* 379 U. S. 47; *New York Times* v. *Sullivan,* 376 U. S. 254; and *Time, Inc.* v. *Hill,* 385 U. S. 374, now effectively insulate political criticism from the threat of libel and invasion of privacy suits except in the most outrageous and egregious cases. The pre-revolutionary constitutional literature, while a vital part of our heritage, sprang from an atmosphere of governmental oppression which they simultaneously served to destroy. The cloak of anonymity was a substitute for the free speech which the First Amendment was designed to insure. Now that the threats of civil and criminal libel prosecutions have been removed, the possibility of reprisal cannot be assumed. Certainly appellant's reliance on *Bates* v. *City of Little Rock,* 361 U. S. 516 and *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449, is misplaced. Those cases presented concrete proof of the existence of a hostile atmosphere and the threat of reprisal against members of the organization. Moreover, the scope of disclosure required in those cases was far broader than the disclosure required in Section 457. While Section 457 requires the names of only the printer and the person or committee who authorized the printing and distribution, the *N.A.A.C.P.* cases required entire membership lists to be placed on public file. Indeed it seems very clear from those cases that disclosure was required for the purpose of reprisal.

CONCLUSION

For the foregoing reasons, the decision below should in all respects be affirmed.

Dated: New York, New York, September 22, 1967.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee

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of Counsel.

APPENDIX "A"

INTERIM REPORT

To: Honorable Louis J. Lefkowitz
Attorney General of the State of New York

From: John G. Bonomi
Special Assistant Attorney General
Counsel, New York Fair Campaign Practices Committee

Re: Printing and Distribution of Anonymous Campaign Literature in 1961 Mayoralty Primary

Introduction

This is an interim report of the Attorney General's investigation into the printing and distribution of anonymous "hate literature" during the 1961 primary campaign for Mayor in New York City.

The present inquiry was instituted at the request of the two Democratic primary candidates, New York State Comptroller Arthur Levitt, the "regular" organization candidate and Mayor Robert F. Wagner.

In the last days of the primary campaign a torrent of charges and counter-charges concerning the printing and distribution of anonymous "hate literature" emanated from the two opposing Democratic factions.

We have restricted our investigation to complaints concerning *anonymous* "hate literature", which may be violative of § 781-b of the Penal Law. This statute provides criminal penalties for the printing of any campaign literature which does not identify the printer or sponsoring organization. The full text of this statute is as follows:

> "§ 781-b. *Printing or other reproduction of certain political literature.* No person shall print or reproduce

in quantity by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the State Constitution whether in favor of or against such political party, candidate, committee, person, proposition or amendment to the State Constitution, in connection with any election of public officers, candidates for nomination for public office, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof or of the person and committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed or reproduced, and no person nor committee shall so print or reproduce for himself or itself any such handbill, pamphlet, circular, post card, placard or letter without also so printing or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee, at whose instance or request a handbill, pamphlet, circular, postcard, placard or letter is printed or reproduced by such principal, and does not include a person working for or employed by such a principal."

Our interim report concerns two such complaints: (1) The Wagner charge that the regular Bronx Democratic organization circulated a packet of anonymous "hate

literature" implying that the Mayor was a "Communist Puppet"; and (2) the Levitt charge that Sanitation Department employees in Queens, distributed an anonymous "Anti-Semitic" leaflet directed against the candidacy of Comptroller Levitt.

After exhaustive investigation we have established that the regular Democratic organizations in the Bronx and Brooklyn did, in fact, distribute the anonymous packet implying Wagner was a "Communist Puppet".

We have found no evidence to support the Levitt complaint that an "Anti-Semitic" leaflet was distributed by Wagner workers or anyone else. Indeed, the Queens Democratic leader who purportedly brought this leaflet to the attention of Levitt headquarters has questioned its origin and authenticity.

Initiation of Investigation

On August 31, 1961, Comptroller Levitt, one of the two candidates in the Democratic mayoralty primary, issued a public statement which, in part, charged that New York Sanitation Department employees were making anti-semitic arguments and circulating anti-semitic leaflets in support of Mayor Wagner's candidacy. This public charge was supported by the release of the "Anti-Semitic" leaflet, purportedly being distributed. On September 1, the Comptroller sent a formal letter of complaint to the Attorney General requesting an investigation.

Mayor Wagner denied any knowledge of the charge and requested that the Fair Campaign Practices Committee, a national non-partisan organization, initiate an inquiry. On September 4, the Attorney General asked the Fair Campaign Practices Committee to nominate an attorney who would be appointed a Special Assistant Attorney General under § 69 of the Executive Law to conduct the requested investigation.

Two days later, on September 6, the Attorney General appointed John G. Bonomi, a Special Assistant Attorney General pursuant to the recommendation of this Committee. The New York City Fair Campaign Practices Committee was organized on the same day, under the aegis of the national group. To assist in the probe Special Assistant Attorney General Bonomi nominated, the New York City Fair Campaign Practices Committee approved, and the Attorney General appointed the following Special Assistant Attorneys General: Manuel Guerreiro; Alexander Holtzman; Donald A. Hopper; Allan A. Pines; William Rand; Walter Wager; and Thomas Weaver. All are practicing attorneys and served on a part time basis, without compensation.

At the request of Special Assistant Attorney General Bonomi, the Superintendent of the New York State Police assigned two investigators to the staff for the conduct of field investigations.

Wagner Charge

On September 6, 1961, Mayor Wagner charged that the regular Bronx Democratic organization was circulating a packet of anonymous "hate literature' implying that he was a "Communist Puppet". This packet consisted of the following four pieces of literature which bore neither the identity of the printer nor the sponsoring organization:

(1) A poster featuring a cartoon in which Mayor Wagner is depicted as a puppet of ex-Senator Herbert Lehman, Mrs. Eleanor Roosevelt, and three labor leaders. A caption on the poster urges voters to "Stop" Lehman, Mrs. Roosevelt et al. and "their Puppet Wagner and all other Splinter Groups, A.D.A.'s and Left Wingers from taking over the Democratic Party";

(2) A poster with the caption "LEHMAN'S NIECE BAILS SOVIET SPY SOBLEN". The body of this poster consists of a copy of an article appearing in the August 29, 1961 issue of the New York Daily News concerning Dr. Robert Soblen, recently convicted of espionage for the Soviet Union. The portion of the article which notes that Lehman's niece furnished bail for Soblen is encircled;

(3) A copy of a photograph of Mayor Wagner with Mrs. Roosevelt which appeared in the August 22, 1961 issue of the New York Post; and

(4) An article in the January 17, 1953 issue of "The Tablet" lauding Comptroller Levitt's anti-communist activities.

The Mayor referred to this packet as "the most scurrilous kit of campaign literature in the history of American politics".

"What is more" the Mayor stated, "reports have reached us that these anonymous leaflets were masterminded by Boss DeSapio and carried out by Boss Buckley's machine in the Bronx. We know that envelopes similar to these were addressed by clubhouse members all last week to special Irish mailing lists. We have received reports that the leaflets were stuffed in Boss Buckley's own clubhouse under the direction of Philip Gilsten, the discredited former Deputy City Treasurer."

INVESTIGATION OF WAGNER CHARGE

In our investigation of the Wagner charge we interviewed about one hundred persons including Philip Gilsten, the Democratic leader in the 8th Assembly District in the Bronx and Executive Member of the North End

Democratic Club, 416 East 189th Street, The Bronx; Benjamin Gluckow, Secretary to Congressman Charles Buckley and Secretary of the North End Democratic Club; New York City Councilman Thomas J. Cuite, the co-ordinator of the Levitt primary campaign in Brooklyn; Carmine DeSapio, former Chairman of the New York County Democratic Committee; registered Democratic voters in the 3rd Assembly District of The Bronx; printers of campaign literature; and campaign consultants to the opposing groups in the Democratic primary.

The original complaint concerning the anonymous "Communist Puppet" kit was made by a family residing in the 3rd Assembly District in the Bronx. This family had received the anonymous kit by mail in an unmarked envelope.

Interviews in the field with registered Democratic voters in the complainant's neighborhood established that a number had received identical kits in unmarked envelopes.

On October 4 two Special Assistant Attorneys General, Donald A. Hopper and Allan A. Pines, interviewed Philip Gilsten at the executive offices of the North End Democratic Club, the so-called "[Congressman] Buckley clubhouse".

Gilsten readily admitted that the anonymous campaign packet implying that Wagner was a "Communist Puppet" was distributed in the Bronx under the auspices of the North End Democratic Club. He described the North End Club as a "drop" for a substantial portion of the Levitt campaign literature distributed in the Bronx. Gilsten further explained that all of the regular Democratic clubs in the Bronx used the North End's facilities for the "processing" of campaign material because of its spacious quarters and considerable experience in this activity.

Gilsten stated that workers from all of the regular Bronx Democratic clubs came to the North End Club to aid in

the preparation of the anonymous "Communist Puppet" kit for distribution. He also reported that some of the anonymous kits were mailed directly from the North End Club while others were circulated by the regular Democratic clubs in their own areas.

Gilsten characterized the anonymous "Wagner Puppet" leaflet as "brilliant" *in conception*. He said the distribution of the anonymous kit was dictated by "politics" and commented "we were fighting for our political life".

Benjamin Gluckow, Secretary to Congressman Charles Buckley and an officer of the North End Club, confirmed Gilsten's statements concerning the distribution of the "Communist Puppet" kit. Upon interview, he stated that he and other workers in the regular Bronx Democratic organization prepared the anonymous kit at the North End Club. He described his role as "stuffing envelopes" with the four leaflets. Gluckow volunteered the information that the North End Club had special "Irish, Italian and Jewish" mailing lists and that the "Communist Puppet" kit "probably went to the Irish list".

Councilman Thomas J. Cuite, the co-ordinator of the Levitt primary campaign in Brooklyn, admitted that the anonymous "Communist Puppet" kit was distributed in Brooklyn through the Levitt campaign headquarters in that borough.

Cuite said that on Friday, September 1, 1961 an unknown "printer" notified him by telephone that certain Levitt campaign literature could be picked up at a "printing or binding firm in Mount Vernon, New York". He said that since he was unable to make arrangements for a Friday pick-up the unknown "printer" said that he would leave the materials at a Democratic club in the Bronx "one block south of Fordham Road . . . right near Webster Avenue". According to Cuite, the following morning, September 2, he set out in search of this Democratic Club.

By meticulously following the travel directions of the unknown "printer" Cuite said he arrived at the North End Democratic Club. Cuite further related that upon arrival at the club he was ushered into its executive offices and introduced to Philip Gilsten. Then Cuite said "In that room I asked if there was any material for the Levitt campaign for Brooklyn headquarters. And the gentleman whom I was speaking to called for some other man and told him I was there to pick up the material for Brooklyn". This latter person, whom Cuite is unable to identify, then guided the Councilman to a public garage situated on an obscure sidestreet in the Bronx. Then Cuite and his unknown guide transferred nine cartons of Levitt campaign literature from a car parked in the garage to Cuite's automobile.

According to Cuite, it wasn't until the following Tuesday, September 5, that he discovered that the nine cartons contained three of the four leaflets included in the anonymous "Communist Puppet" kit. The Councilman said that he stored the closed cartons in the assembly room of Levitt's campaign headquarters in Brooklyn over the Labor Day weekend and they were not opened until September 5. Councilman Cuite said that he obtained the fourth anonymous leaflet in the "Communist Puppet" kit directly from a firm known as the Seminole Printing Corporation.

Cuite stated that Levitt's Brooklyn headquarters distributed the anonymous "Communist Puppet" literature to the borough's regular Democratic leaders for use in their home areas.

As noted previously, one of the anonymous circulars included in the "Communist Puppet" kit was a copy of an article appearing in "The Tablet", praising Comptroller Levitt's anti-communist activities. We have established that 100,000 copies of this anonymous circular were

printed by Seminole Printing Corporation, Inc., 225 Varick Street, New York. Another 50,000 copies of the circular were printed by Printolith Corp., 118 East 25th Street, New York, at the request of the Seminole Corporation.

Joseph Cohen, the proprietor of Seminole was unable to explain the absence of any printer's or sponsor's identification on this circular. Max Weiss, the president of Printolith admitted the omission of any identification on the anonymous "Tablet" circulars he printed.

William Volet, Executive Assistant to Comptroller Levitt, placed the two orders with Seminole. There is no evidence that Volet instructed either printer to omit the identification required under the law.

Our investigation to determine the printer of the three other anonymous circulars included in the "Communist Puppet" kit has been temporarily delayed by an order of Justice George Tilzer of the New York State Supreme Court restraining the Attorney General from obtaining the books and records of the North End Democratic Club. In order to ascertain whether the North End Club ordered this anonymous literature we served Philip Gilsten on October 4, with a personal subpoena and a subpoena duces tecum calling for certain books and records of the Club. Gilsten did not appear at the Attorney General's office on the return date of the subpoena, October 6. On Sunday, October 8, Justice Tilzer signed an order to show cause why both subpoenas should not be vacated or modified. He also signed a stay order enjoining the Attorney General from taking "any steps or proceedings to compel the appearance of Gilsten" or the production of North End's books. The Attorney General is further restrained under this order from proceeding against Gilsten for contempt. As of this date the motion is still pending in Part I of the Supreme Court.

Appendix "A"

Upon interview Carmine DeSapio denied Mayor Wagner's charge that he "masterminded" the "Communist Puppet" kit. Our investigation has uncovered no evidence that DeSapio either "masterminded" or participated in any way in the distribution of this literature.

LEVITT CHARGE

On August 31, 1961, Comptroller Levitt issued a public charge that campaign workers for Mayor Wagner had injected anti-Semitism into the Democratic primary contest. Comptroller Levitt said, "I have confirmed that 600 workers of the Sanitation Department are working in Queens . . . using the argument that a victory for Levitt will leave a Jew to run against a Jew—Levitt v. Lefkowitz". On the same date Levitt headquarters released a photographic copy of what a spokesman called a sample of the anti-Semitic literature allegedly distributed in Queens. This "Anti-Semitic" circular bore the legend:

IRISH AMERICAN DEMOCRATS
VOTE FOR WAGNER
On Primary Day
Thurs. Sept. 7th
3 PM to 10 PM
OR ELSE YOU WILL HAVE
A LEVITT OR A LEFKOWITZ AS MAYOR

The LEVITT headquarters identified Matthew Troy, Jr., Democratic Leader in the 9th Assembly District, Part A in Queens and Harold Fisher, Chairman of the Law Committee of the Brooklyn Democratic organization, to the press as the sources of these charges. This public statement received wide publicity in the metropolitan newspapers and appeared on page one of the New York Times on September 1.

Appendix "A"

On September 1, Comptroller Levitt sent a formal complaint to the Attorney General which stated in part that "groups have been busy going into the non-Jewish areas using the argument that unless Wagner is elected in the Primary 'the Jews will take over City Hall'.

"The history of this kind of campaign is not new in American politics. Every major Jewish figure has been subjected to it. I can recall instances in the past when this same vile literature—unattributed, irresponsible, bigoted in every respect—was used against Herbert Lehman . . . I am asking for nothing more than what he has always asked—that the purveyors of this literature and the whispering hate mongers be stopped". (Underlining added by our staff)

To support this charge of the distribution of anti-Semitic literature the Comptroller attached as an exhibit "a photostatic copy of literature addressed to Irish-American Democrats"—the anonymous "Anti-Semitic" leaflet to which we have previously referred. The Levitt complaint included no evidence in this matter beyond the naked charge and the copy of the "Anti-Semitic" leaflet. On the same evening the Comptroller appeared on NBC—TV and repeated the charge. At that time he once again exhibited a copy of the anonymous "Anti-Semitic" leaflet. Two days later, on September 3, Comptroller Levitt stated on the "Direct Line" television program, "these instances of anti-Semitic literature were brought to my attention from responsible sources" (underlining added by our staff).

INVESTIGATION OF LEVITT CHARGE

During the course of this inquiry into the anonymous "Anti-Semitic" circular over 100 witnesses were interviewed, including Frank Lucia, New York City Commissioner of Sanitation; a considerable number of Sanitation

Department supervisors and employees active in the Wagner primary campaign; campaign advisors to the Mayor; registered Democratic voters in the 9th Assembly District in Queens; the Democratic leader of Part A of that Assembly District, Matthew Troy, Jr.; Harold Fisher, Chairman of the Law Committee of the Brooklyn Democratic organization; former Justice Daniel V. Sullivan, Levitt's campaign manager; William Vanden Heuvel, a Levitt campaign consultant; and Irwin Rosenthal, a researcher at Levitt headquarters at the Hotel Biltmore, Manhattan.

Our investigation established that in August, 1961 Sanitation Commissioner Frank Lucia organized a 9th A. D. Independent Citizens Committee for Wagner in the Queens Village area. About seventy persons, mainly Sanitation Department employees, "volunteered" or were recruited by the Uniformed Sanitationmen's Union as workers for this Committee. During the period before the September 7 primary this Wagner Committee conducted a highly organized campaign on behalf of the Mayor, including door-to-door canvassing and distribution of literature. The Levitt group charged that these campaign workers were making anti-Semitic arguments and distributing the anonymous "Anti-Semitic" circular.

Matthew Troy, Jr., identified by the Levitt group as the person who originally brought the "Anti-Semitic" circular to their attention gave sworn testimony before our staff on two occasions. Troy said that several weeks before the primary he began to receive reports that sanitation workers with the 9th A. D. Citizens Committee for Wagner, were making anti-Semitic arguments in door-to-door canvassing. He said that he transmitted these reports to Irwin Rosenthal, a member of the Levitt research staff. Troy further stated that, on the urging of Rosenthal, he went to regular Democratic headquarters in the Biltmore

Hotel and repeated these reports to Levitt's campaign advisors.

He said that he was asked at that time whether any anti-Semitic circulars were being distributed in the Queens Village area. Troy said that he told the Levitt advisors that no such reports had been made to him. According to Troy he saw a copy of the "Anti-Semitic" leaflet for the first time on September 1 at Levitt headquarters in the Biltmore Hotel. The questioning of Troy was as follows:

> Q. Well, sometime before September 1st, when Mr. Levitt appeared on television with this exhibit did you see an original of the circular at the Biltmore? A. Yes, I believe it was on September 1st that I saw it. . . .
>
> Q. Did you bring that original to the Biltmore? A. No, I did not.
>
> Q. Do you have any knowledge of how it arrived at the Biltmore? A. I have none whatsoever, except to say that was there in the room and showed to me when—after I had come into the room. I have no idea.
>
> Q. Who showed it to you? A. I don't remember now. I don't remember at all.
>
> Q. Well, what did the people at the Biltmore have to say about the source of this literature? A. If I recall, I asked them where they got this piece of literature, and they said that the captains from the districts were bringing them in. And from the way they talked I assumed that they had more. I thought they had. Well, it was in my own mind, but I felt they had better than 20 of them. The way they said the captains were bringing them in. It seemed to be a multiple operation rather than just one, but the one they showed me was a very rolled up—it had been straightened out now, but it appeared to have rolled up and creased or it had been left lying somewhere, and a person might roll it up and throw it away.

Appendix "A"

On August 31, the Levitt headquarters released a copy of the "Anti-Semitic" circular to the press and on the following day this leaflet was exhibited over television by Comptroller Levitt.

Troy gave sworn testimony that on September 4th, five days after the "Anti-Semitic" circular exhibit was released by Levitt Headquarters, an unknown person brought a copy of this leaflet to his office at the Queens Village Democratic Club. Troy said that this was the first time he knew of any such circular in the Queens Village area. He stated that he thought the bearer of this circular "might be planted or he might be being used by somebody to plant it in our area to give credence to the story that was being told". Troy stated that he brought the "Anti-Semitic" circular to Levitt headquarters on September 5 or 6. At that time, according to Troy, he told the Levitt campaign staff that he "doubted the authenticity of the piece of literature."

We have been advised by expert printers that the anonymous "Anti-Semitic" leaflet was an "amateur's job". These printers are of the opinion that the composition of the circular indicates that it was printed by an unskilled and inexperienced person.

Commissioner Lucia and all of the Sanitation Department employees interviewed, denied any knowledge of the printing or distribution of the anonymous "Anti-Semitic" leaflet. In fact, Lucia opined that the circular was an "opposition plant". Interviews by our field staff with registered Democratic voters in the 9th Assembly District in Queens uncovered no person who had received a copy of this anonymous leaflet.

Harold Fisher, Chairman of the Brooklyn Democratic Law Committee, identified by Levitt headquarters as a second complainant in this matter, was also interviewed by our staff. Fisher recalled receiving complaints about anti-Semitic arguments being used by Wagner workers.

However, he was unable to identify any person who made such complaints. He further stated that he had no information about the distribution of the anonymous "Anti-Semitic" leaflet and saw it for the first time when Comptroller Levitt appeared on television on September 1.

We enlisted Comptroller Levitt's aid in tracing the source of the anonymous "Anti-Semitic" circular utilized in his public statement of August 31 and his television appearance of September 1. He referred our staff to William Vanden Heuvel, a campaign advisor. Comptroller Levitt, in a letter to Special Assistant Attorney General Bonomi, dated October 19, 1961, stated, "I was handed the literature in my New York City Headquarters by Mr. William Vanden Heuvel".

Vanden Heuvel, upon interview, said that he had no personal knowledge how many copies of the "Anti-Semitic" circular arrived at Levitt Headquarters but speculated "I would presume it came from Matthew Troy or his captains, or the people in that area who received it. It possibly could have come anonymously in the mails as many things that crop up in campaigns unfortunately arrive".

No other campaign advisor at Levitt Headquarters was able to cast any light on the source of the anonymous "Anti-Semitic" leaflet. A few believe, however, that Matthew Troy, Jr., had reported the distribution of this literature in the Queens Village area prior to September 1.

Troy was also interviewed concerning the Levitt charge that anti-Semitic arguments were being used by Wagner workers in door-to-door campaigns. He said that two captains in his Assembly District reported the use of anti-Semitic arguments by Wagner campaign workers. However, Troy refused, under oath, to identify these captains or give any information about complaints of this nature in the Queens Village area. Only one of Troy's election captains, Salvatore Sciame, stated that he heard such reports. He said that unidentified customers of his grocery

store told him "that somebody had approached them saying that it would be a situation (if Wagner lost the primary) where a Jew would be running against a Jew". Interviews by our staff in Sciame's election district failed to uncover any Democratic voter who heard anti-Semitic arguments being used by Wagner workers. The Sanitation Department personnel appearing before our staff denied any such activity.

* * * * *

We will submit a *final* report at a later date concerning our further investigative findings, conclusions and legislative recommendations.

In closing this *interim* report, we wish to express our appreciation to the Attorney General for the cooperation afforded this investigation in generously providing office space and extensive clerical help. We might also note that the Attorney General has scrupulously adhered to his pre-investigation pledge to give our staff a "free hand" in the conduct of this inquiry.

APPENDIX "B"

Final Report

To: Honorable Louis J. Lefkowitz
Attorney General of the State of New York

From: John G. Bonomi
Special Assistant Attorney General
Counsel, New York City Fair Campaign Practices Committee

Re: Printing and Distribution of Anonymous Campaign Literature in 1961 Primary and General Elections in New York City

Introduction

This is the "Final Report" of the Attorney General's investigation into the printing and distribution of anonymous literature during the 1961 primary and general election campaigns in New York City. On November 3, 1961, we publicly released our "Interim Report".

In this report, we have incorporated additional investigative findings and our legislative recommendations. Our investigative findings concern campaign literature which may have been printed, distributed and financed in violation of § 781-b of the Penal Law and/or Article 13, §§ 320-328 of the Election Law (see Appendix I for full text of § 781-b, Penal Law). In addition, we have conducted two studies which suggest serious defects in Section 781-b.

Section 781-b provides criminal penalties for the printing of any campaign literature which does not identify either the printer or sponsoring organization.

Article 13 of the Election Law requires that "political committees" file detailed statements of all campaign receipts and expenditures (including those financial transac-

tions which relate to the printing and distribution of campaign literature) with both the New York Secretary of State and the New York City Board of Elections. A "political committee" is defined by this Article as any group of three or more persons cooperating to aid in the election or defeat of a political candidate (§ 320, Election Law).

Under § 776 of the Penal Law, a treasurer of a "political committee" who neglects to file the financial statement required by the Election Law is subject to criminal penalties. Any person who knowingly and willfully violates any other section of Article 13 is chargeable with a misdemeanor under § 783 of the Penal Law (see Appendix II for full texts of §§ 776 and 783, Penal Law).

Summary of Findings

In our November 1961 "Interim Report", we found no evidence, whatsoever, to support a complaint by the regular Democratic organization that an anonymous "Anti-Semitic" leaflet had been distributed by workers for Mayor Robert F. Wagner.

We did, however, establish that the regular Democratic organizations in the Bronx and Brooklyn distributed anonymous literature during the 1961 primary campaign implying that the Mayor was a "Communist Puppet". We further ascertained the identity of two printers responsible for the illegal printing of 150,000 copies of this anonymous literature (§ 781-b, Penal Law).

Now, in this "Final Report", we set forth the results of the following investigations and studies:

(1) *"Communist Puppet" Kit*

Since our "Interim Report" on "Communist Puppet" literature, we have obtained the *sworn* testimony of Philip

Gilsten, a Bronx Democratic leader and Executive Member of the North End Democratic Club. Gilsten's sworn testimony confirmed our interim finding that the North End Club acted as a distribution center for "Communist Puppet" circulars.

An examination of the records of the North End Club disclosed no evidence of expenditures for the printing of anonymous literature. However, these records were maintained by Gilsten in clear violation of those provisions of the Election Law which require detailed accounting of campaign receipts and expenditures.

(2) *"Wagner Committee"*

John J. Gilhooley, a Republican candidate for City Controller, denounced a political advertisement in the November 4 issue of the "Irish Echo", a weekly newspaper, as a "minority appeal". The ad was bare of sponsor's identification except for a line reading "Independent Citizens Committee for Wagner, Screvane and Beame".

Wagner Campaign Manager Edward P. Cavanaugh promptly disavowed the ad as "unauthorized" and "deplorable". Upon interview, Sean Keating, then Assistant to the Mayor, defended the ad as not "too outrageous".

Our inquiry revealed that the ad's sponsoring committee was conceived at a meeting between Keating and two friends at Wagner headquarters. Keating said that his overriding concern was whether "they had Wagner, Beame and Screvane's name" on the ad and claimed only a casual interest in the committee's activities after the first meeting. The evidence indicates that the committee was formed without the knowledge or authorization of the Mayor and subsequently operated independent of Wagner headquarters.

There are no provisions in the Penal or Election Laws governing the identification of sponsors of political ads

appearing in newspapers, magazines and other periodicals. As a consequence, such a sponsoring group may remain anonymous or identify itself in a vague and misleading manner.

(3) *"Anonymous Posters"*

Our second study involved anonymous (but non-scurrilous) political posters exhibited in Democratic primary contests in the Yorkville and East Harlem areas of New York. These posters, which came to our attention during the interim investigation, supported the regular organization candidate for District Leader and City Councilman in those areas, John J. Merli. Our staff uncovered the printer and financier of these placards.

Under § 781-b of the Penal Law, a printer may be held criminally responsible for those anonymous posters which relate to the election of "public officers" such as city councilmen. However, he may not be prosecuted for printing anonymous placards which concern a district leader contest since elections of "party officers" are omitted from the provisions of Section 781-b.

(I)

INVESTIGATION RE: "COMMUNIST PUPPET" KIT

Philip Gilsten, Democratic leader in the Eighth Assembly District of the Bronx and Executive Member of the North End Democratic Club, had been interviewed at the North End Club on October 4. At that time, Gilsten readily admitted that an anonymous campaign packet implying that Wagner was a "Communist Puppet" was distributed in the Bronx under the auspices of the North End Democratic Club. He described the North End Club as a "drop" for a substantial portion of the Levitt campaign

literature distributed in the Bronx. Gilsten further explained that all of the regular Democratic clubs in the Bronx used the North End's facilities for the "processing" of campaign material because of its spacious quarters and considerable experience in this activity.

Gilsten, in the October 4 interview, stated that workers from all of the regular Bronx Democratic clubs came to the North End Club to aid in the preparation of the anonymous "Communist Puppet" kit for distribution. He also reported that some of the anonymous kits were mailed directly from the North End Club, while others were circulated by the regular Democratic clubs in their own areas.

Gilsten, at that time, characterized the anonymous "Wagner Puppet" leaflet as "brilliant" in conception. He said the distribution of the anonymous kit was dictated by "politics" and commented, "we were fighting for our political life".

In order to obtain the *sworn* testimony of Gilsten and ascertain whether the North End Club had ordered any of this anonymous literature, we served Gilsten, on October 4, with a personal subpoena and a subpoena duces tecum calling for certain books and records of his organization. Gilsten did not appear at the Attorney General's office on the return date of the subpoena, October 6. October 8, Justice George Tilzer signed an order to show cause in the New York State Supreme Court why both subpoenas should not be vacated or modified. Justice Tilzer also signed a stay order enjoining the Attorney General from taking "any steps or proceedings to compel the appearance" of Gilsten or the production of the North End's books. The motion was argued in Part I of the New York Supreme Court in October 10. On November 20, Justice Owen McGivern ordered Gilsten to appear at the Attorney General's office on November 28 and produce certain books and records of the North End Club.

On this latter date, Gilsten appeared and was examined under oath. Gilsten admitted, in his sworn testimony, that the North End Democratic Club acted as a distribution center for the anonymous "Communist Puppet" literature circulated in the Bronx.

Gilsten swore that he had no idea where the anonymous "Communist Puppet" literature was printed or how this material arrived at the North End Club. [It should be noted that during the interim investigation, we established that certain of this anonymous literature was ordered at the city-wide regular Democratic headquarters; printed by two New York City concerns; and that nine cartons of "Communist Puppet" kits were obtained by City Councilman Thomas J. Cuite after a brief conference with Gilsten and his aides at the North End Club.]

Meager financial books and records were produced by Gilsten in response to the subpoena duces tecum. The North End Club's financial records consisted almost entirely of cancelled checks, bank statements and check stub books. However, a major portion of the club's 1961 primary campaign receipts and expenditures were in cash and non-recorded.

Gilsten acted as de facto treasurer for the 8th Assembly District's "Political Committee" (actually the North End Democratic Club) in the 1961 Democratic primary. He stated that he personally collected all monies contributed to the committee for the primary campaign and also supervised all expenditures.

As previously indicated, Article 13 of the Election Law makes the "treasurer" of a "political committee" responsible for maintaining certain financial records and filing prescribed statements with tthe Board of Elections and the Secretary of State. A record search showed that neither the "treasurer" nor any other person associated with the 8th Assembly District's "political committee" had

filed a financial statement with the Secretary of State as required by § 324 of the Election Law.

This search also revealed a violation of § 325 of the Election Law in that no statement had been filed with the Secretary of State identifying the "treasurer" of the 8th A. D. "political committee".

Furthermore, § 325 as supplemented by § 327 of the Election Law requires the "treasurer" of a "political committee" to maintain a "detailed account" of all campaign receipts and expenditures, including a "receipted bill" stating the particulars of each expense. Gilsten's sworn examination revealed that he did not maintain ordinary business accounts and had no "receipted bills" for most expenses incurred.

The records produced by Gilsten established that Benjamin Gluckow, Secretary to Congressman Charles Buckley, filed a financial statement with the Board of Elections for the 8th A. D. "political committee" on September 28, 1961. However, this statement was contrary to the requirements of § 321 of the Election Law in that it was unsworn and failed to set forth the particulars prescribed by the statute.

No pre-primary financial statement was filed with the Board of Elections or the Secretary of State as required by § 323 of the Election Law.

(H)

STUDY RE: "WAGNER COMMITTEE"

The November 4 issue of the "Irish Echo", a weekly newspaper, situated at 1849 Broadway, New York County, contained a full page political advertisement which identified the sponsoring group as the "Independent Citizens Committee for Wagner, Screvane and Beame". No committee address or sponsoring member was listed.

Appendix "B"

This advertisement featured a headline which stated:

"THE IRISH VOTER PUT KENNEDY IN THE WHITE HOUSE LET'S SEND WAGNER AND HIS TEAM BACK TO CITY HALL"

On November 5, John J. Gilhooley, the Republican candidate for City Controller, denounced the "Irish Echo" advertisement. He stated, "This Wagner advertisement is an insult to the Presidency of the United States; it is an insult to President Kennedy himself who never made such minority appeals." Gilhooley exhorted the Mayor, "Don't drag us back into a time when 'we' meant a minority group in a racial or political or social ghetto."

Since the advertisement was not anonymous and appeared to accurately identify the sponsor as a "Wagner Committee", Gilhooley's charge was not initially investigated by our staff. However, in response to an inquiry from the New York City Fair Campaign Practices Committee, Edward P. Cavanaugh, Mayor Wagner's campaign manager, stated that the sponsoring group was "unauthorized" and that Wagner headquarters "deplored this type of campaigning". At the request of the New York Fair Campaign Practices Committee, we thereupon initiated a study of this situation.

In the initial stages of this inquiry, we were informed by the editors of the "Irish Echo", that one John O'Donnell, a restaurant owner, whose home address was unknown, had ordered the ad. After considerable investigation we located O'Donnell, and he was examined under oath at the Attorney General's office concerning the make-up of the "Independent Citizens Committee for Wagner, Screvane and Beame". This portion of the examination proceeded as follows:

"Q. You see at the bottom of that exhibit (advertisement in 'Irish Echo') there is 'Independent Citizens Committee for Wagner, Screvane and Beame'.

Who are the people on that committee? A. Jim (Fitzpatrick) would know better than me.

Q. Do you know? A. No. I'm a member of a committee in connection with that ad, I'm a member of a committee of three, I suppose you call it. That's the way it originated between Keating, Fitzpatrick and myself.

Q. As far as you know, the Committee is made up of Sean Keating, Fitzpatrick and yourself. A. Possibly.

Q. Don't you know? A. I know we were three of the members."

O'Donnell relayed that some time prior to the general election on November 7, 1961, he and James Fitzpatrick, a salesman, met with a long time friend, Sean Keating, then Assistant to the Mayor, at Wagner campaign headquarters in the Hotel Astor.

O'Donnell said that the purpose of this visit was to purchase tickets for a Wagner campaign banquet. However, during the course of the meeting, Fitzpatrick suggested that it would be "nice if we had a full page ad in the 'Irish Echo'" endorsing Mayor Wagner. Then, according to O'Donnell, Fitzpatrick volunteered to act as treasurer of the group; Keating wrote some innocuous advertising copy; and O'Donnell telephoned James A. Callahan, advertising agent of the "Irish Echo", to make preliminary arrangements for the advertisement.

O'Donnell said that at a later meeting in O'Donnell's restaurant, Callahan wrote the portion of the advertisment characterized by Gilhooley as a "minority appeal". O'Donnell stated that Callahan also "dreamt-up" the name to be given to the sponsoring group, "Independent Citizens Committee for Wagner, Screvane and Beame".

James Fitzpatrick, a district sales manager for a New York concern, gave sworn testimony in the "Wagner Com-

mittee" inquiry. Fitzpatrick stated that he had known Keating socially for about twenty years. His version of the meeting with Keating at the Hotel Astor was substantially the same as O'Donnell's. Fitzpatrick stated that his sole function with the committee was to act as treasurer.

Upon interview, James Callahan, the advertising agent for the "Irish Echo", stated that on October 26, 1961, O'Donnell called him at the newspaper offices concerning a proposed political advertisement. Callahan said that he met the same day with O'Donnell and Fitzpatrick to make arrangements for the insertion of the ad in the "Irish Echo". Callahan's version of this meeting was brought out in the following questions and answers:

> "Q. Who suggested that the caption should be put on the advertisement 'Independent Citizens' Committee for Wagner, Screvane and Beame'? A. Well, I said, 'Now fellows, whose going to pay for this ad?' They said, 'We are.' I said 'O. K.' Now I had to have a source. They said 'Independent Citizens' Committee for Wagner, Screvane and Beame'.
>
> Q. Who said it? A. Both of them.
>
> Q. Mr. O'Donnell and Mr. Fitzpatrick? A. Yes."

Callahan further stated that he had written the "minority appeal" headline for the advertisement in order to give it "zip" and "a punch line".

Callahan said that the price of the ad was $400. John Grimes, the business manager of the "Irish Echo" stated that on December 1, Fitzpatrick paid for the advertisement with $395 in cash and a $5 check.

A search of the records of the Board of Elections and Secretary of State revealed that Fitzpatrick as "de facto treasurer" of an "informal committee for the placing of an ad in the 'Irish Echo' to support the re-election of Hon. Robert F. Wagner" (actually the so-called "Inde-

pendent Citizens Committee for Wagner, Screvane and Beame") had filed the financial statements required of "political committees" under the Election Law. This statement identified eighteen persons who had allegedly contributed $350 and pledged $50 for the "Irish Echo" advertisement. The listed contributors included John J. O'Connor, a business associate of Keating's in the Fairways Travel Agency, 589 West 207th Street, New York County.

Further inquiry disclosed that the donors were all social or business friends of Keating, Fitzpatrick and O'Donnell. Several of the contributors stated that they made donations out of "friendship" rather than political conviction and that they were actually supporters of Lawrence Gerosa, a third-party candidate in the mayoralty race.

Sean Keating, former Assistant to the Mayor and now Regional Director of the United States Post Office was interviewed on November 15, 1961. Keating substantiated the statements of O'Donnell and Fitzpatrick concerning the initial meeting at the Hotel Astor. He denied any further active participation in the committee's work.

Keating defended the committee's ad, stating "I didn't see anything too outrageous. Just as long as they had Wagner, Beame and Screvane's name on there, that's what I was concerned with."

He said that even though the idea for sponsoring the "Irish Echo" advertisement originated in his office at Wagner headquarters, the committee was "unauthorized". He stated that Wagner Campaign Manager Cavanaugh "called me at my room and said 'who the hell put this ad in? Did we authorize that?' I said, 'No.' I said 'It was somebody else entirely'. So he was satisfied then because somebody had evidently brought it to his attention."

When Keating was asked whether he had ever made an inquiry concerning the full membership of the committee, he retorted, "No, because I knew that O'Donnell and

'Fitz' had taken the ad out and I assumed that they were the Independent Citizens because they're both independent and they're both citizens."

(III)

STUDY RE: "ANONYMOUS POSTERS"

During this investigation, we were informed that anonymous (but non-scurrilous) political posters were being exhibited in the Yorkville and lower East Harlem areas of New York County. One of these posters depicted Carlos Rios, an "insurgent" primary candidate for Democratic Leader in the 10th Assembly District of New York County as a "puppet" of Assemblyman Mark Lane. Another anonymous poster showed Robert Low, an "insurgent" Democratic Councilman candidate in the 22nd Senatorial District as a "puppet" of Mayor Wagner. Both of these posters endorsed the candidacy of John J. Merli, the "regular" Democratic organization candidate in the District Leader and Councilman primaries.

A field survey revealed that about thirty such anonymous posters were in evidence in these areas.

Further investigation revealed that Maxwell Mokut, Chairman of the "Independent Democrats for the Re-election of John J. Merli" had ordered and paid for these posters. Our investigation also established that David Schoer, the owner of Grenshaw Studios, 25 West 26th Street, New York County, drew the "puppet" cartoons featured on both posters; and that Henry Fuchs, a printer operating under the trade name of Sun Litho Art, 135 West 25th Street, New York County, printed "a thousand or two thousand" copies of these anonymous placards.

Upon examination, Fuchs stated that although he had printed political posters previously, "I don't put no identification on none of my printing".

Appendix "B"

Legislative Recommendations

We, in New York, are in the "horse and buggy age" in the consideration of legal weapons to combat *anonymous* "hate literature".

The great preponderance of campaign "hate literature" is ordered, printed and distributed in a furtive and conspiratorial manner. There is a compelling reason for this secrecy. The political leaders responsible for the dissemination of "hate literature" live in mortal fear of discovery by an aroused and enlightened electorate.

We believe that the most effective legal means for fighting hate peddlers is to remove their cloak of anonymity. If these persons are clearly identified, the voting public may avail itself of a potent weapon—retribution at the polls.

The constitutionality of the identification requirements of the Federal Corrupt Practices Act (which are substantially similar to those in the New York statute) has been upheld in *United States* v. *Scott* (U.S.D.C., Nor. Dak., 1961) not off. cit., 30 U.S.L.W. 2066, relying on *Communist Party* v. *S.A.C. Board* (1961), 367 U. S. 1.

Of course, the mere passage of a criminal statute requiring clear identification of the sponsors of campaign literature will not guarantee success. Those agencies responsible for the supervision of elections and prosecution of criminal offenders must be vigilant and dedicated. They must be ever ready to dig out those who print, distribute and finance anonymous campaign literature. And the voting public must be constantly alerted to such unfair campaign practices by a responsible and free press.

The only New York statute which even remotely bears on the problem is § 781-b of the Penal Law. This statute prohibits the *printing* of anonymous campaign circulars. However, Section 781-b is riddled with inequities and omissions. Thus, a political leader responsible for the *ordering* and *distribution* of anonymous campaign literature is im-

mune from prosecution; anonymous political advertisements in newspapers, magazines and other periodicals are omitted from provisions of the statute; and anonymous circulars may be printed with impunity if they concern an election of a "party officer", such as a district leader.

It is true that the publisher of a written statement which defames an individual may be held criminally responsible (Penal Law, § 1341) and civilly liable. However, these remedies are grossly inadequate where political candidates or public officials are the aggrieved parties. (See Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875.)

The weaknesses inherent in these statutes are compounded by the administration of the election laws in the City of New York. Our investigation indicated that the Board of Elections has not exercised certain of its statutory powers.

For example, under § 38 of the Election Law, the Board "and any of the commissioners thereof may require any person to attend before the board or a commissioner at the office of the board or a branch office and be examined by the board or a commissioner as to *any matter* in relation to which the board is charged with a duty under this chapter or concerning violations of this chapter, or of the provisions of the penal law relating to the elective franchise, and may issue subpoena therefor . . ." (Emphasis by our staff.) Yet, even where violations of the Election and Penal Laws were apparent (i.e., printing of anonymous "Communist Puppet" literature and failure of the North End Club to file a pre-primary financial statement) the Board undertook no inquiry.

In view of the enumerated defects in the law and its administration, we are making the following legislative recommendations to the Attorney General:

1. That § 781-b of the Penal Law be amended to prohibit any person from "printing, publishing or distribut-

ing" anonymous campaign literature or "causing" such literature "to be printed, published or distributed".

As it stands, Section 781-b neither deters nor punishes those primarily responsible for anonymous campaign literature—the financier and distributor. Under the proposed amendment, persons who print, finance or distribute anonymous campaign literature, could be criminally prosecuted.

2. That Section 781-b be amended to require that campaign literature bears both the name and address of the printer *and* the name and address of the specific person and organization which ordered the ad.

The present statute is phrased in the alternative, requiring identification of the printer *or* "the person and committee at whose instance" the circulars were printed. Hence, the sponsors may remain anonymous and comply with the law.

3. That Section 781-b be amended to provide criminal penalties for the printing, ordering or distribution of anonymous literature in campaigns for "party" as well as "public" office.

The present section applies to "any election of public officers, (or) candidates for nomination for public office"; i.e., general and primary elections for Mayor, City Councilman, etc. The statute does not proscribe the printing of anonymous literature in campaigns for "party office", such as district leader.

4. That Section 781-b be amended to prohibit newspapers, magazines and other periodicals from printing or publishing campaign advertisements which do not identify the person and committee sponsoring the ad by name and address.

Under the present law, sponsors of such ads may remain anonymous or identify themselves in a nebulous and misleading manner.

Our inquiry disclosed that most newspapers and other periodicals circulated in the New York City area require proper identification of sponsors of political advertisements. However, this voluntary practice is not universal. As a result of vague sponsor identification, the "Irish Echo" ad was initially attributed to Wagner headquarters and provoked charges of official Democratic endorsement of a "minority appeal". Only painstaking investigation disclosed that the committee name was apparently the product of an advertising agent's imagination and the sponsoring group operating independent of Wagner headquarters.

We believe that any laxity on the part of agencies supervising the conduct of elections cannot be cured by legislative mandate. In this area, the need is not for additional laws, but for officials with an awareness of their powers and responsibilities under existing statutes.

The following Special Assistant Attorneys General participated in this investigation of anonymous campaign literature and the preparation of our interim and final reports: Manuel Guerreiro; Alexander Holtzman; Donald A. Hopper; Allan A. Pines; William Rand, Jr.; and Walter Wager.

Three investigators aided our staff in the conduct of field investigations: John L. Cronin, New York State Police; Charles M. Eidel, New York State Police; and James Malone, Election Frauds Bureau, Office of the Attorney General.

Appendix "B"

We wish to express our appreciation to Attorney General Louis J. Lefkowitz and State Police Superintendent Arthur Cornelius, Jr. for placing these investigators at the disposal of our staff. In addition, the Attorney General generously provided office space and clerical aid.

We wish to note that the Attorney General scrupulously adhered to his pre-investigation pledge to allow our staff a completely "free hand" in the conduct of this inquiry.

APPENDIX I

§ 781-b—Penal Law

"§ 781-b. *Printing or other reproduction of certain political literature.* No person shall print or reproduce in quantity by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the State Constitution whether in favor of or against such political party candidate, committee, person, proposition or amendment to the State Constitution, in connection with any election of public officers, candidates for nomination for public office, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof or of the person and committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed or reproduced, and no person nor committee shall so print or reproduce for himself or itself any such handbill, pamphlet, circular, post card, placard or letter without also so printing or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee, at whose instance or request a handbill, pamphlet, circular, postcard, placard or letter is printed or reproduced by such principal, and does not include a person working for or employed by such a principal."

APPENDIX II

§§ 776 and 783—Penal Law

"§ 776. *Failure to file statement of receipts, expenditures and contributions.* Any candidate for election to public office, or any candidate for nomination to public office at a primary election, or any treasurer of a political committee as defined by the election law, who neglects to file, as required by the election law, a statement of receipts, expenditures and contributions shall be guilty of a misdemeanor."

"§ 783. *Crimes against the elective franchise not otherwise provided for.* Any person who knowingly and wilfully violates any provision of chapter seventeen of the consolidated laws of this state, known as the election law, which violation is not specifically covered by any of the previous sections of this article is guilty of a misdemeanor."

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IN THE

Supreme Court of the United States

October Term, 1967

No. 29

SANFORD ZWICKLER,

Appellant,

—against—

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL TO THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AS *AMICUS CURIAE*, IN SUPPORT OF APPELLEE

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32 CASE PRESS INC., 421 HUDSON ST., N.Y.—ORegon 5-4540

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—against—

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AS *AMICUS CURIAE*, IN SUPPORT OF APPELLEE

Introduction: Interest of *Amicus*

It would ill-suit the aims of our existence as an organization made up of prosecuting attorneys throughout the United States if we were not to make a sincere attempt to oppose those who, in their quest to denigrate laws proscribing conduct deemed inimical to the harmonious and fruitful exercise of governmental powers, fall back on the basic rights secured to us by our Nation's Founding Fathers in the Bill of Rights, and "pluck" from it the guarantee then most suitable for their purpose, and by its use, not as a shield, but as a weapon, indulge in a "war" to convince courts that a particular right of an individual transcends a free and orderly society.

It is respectfully urged that a law such as Section 781-b of the Penal Law of the State of New York, as so identified in the Record of this case, and now known as Section 457 of the Election Law of the State of New York,* is one of such vital significance, and so much a part of the proper exercise of the elective franchise, that any successful attack of it as violative of free expression, might have the disastrous consequence of demeaning the processes of our altruistically-operated democratic form of government. As a result, this society might become subject to constant changes, some perhaps perilous, brought about by an electorate in whose minds are instilled possible ill-conceived and unfounded thoughts, regarding election and political matters, cleverly-conveyed from sources concealed in anonymity.

At least 36 states have recognized the need for the type of statute involved (see *Talley* v. *California*, 362 U.S. 60, 70 [1960], *infra*), and, according to one jurist, who has advanced the thought that such a law "represents the view of both political parties [in the State of Pennsylvania]," also stated that ". . . even the judiciary is not so remote from the realities of political life that it cannot recognize it as *wholesome* and desirable legislation." (See *Commonwealth* v. *Evans*, 156 Pa. Super. 321, 325-27, 40 A. 2d 137, 138-39 [1945], *infra* [Reno, J.] [emphasis supplied].)

We, therefore, take the position that a statute such as the one now before this Court, is "wholesome," and is a reasonable restraint upon the exercise of free expression, so that a greater good can be accomplished. Consequently, since we feel that such a statute is not unconstitutional, we

* See pages 3-4, *infra*.

respectfully submit that the appellant's attempt to veer this Court from the path of sound principles of abstention and federalism, is without merit for the reasons hereinafter set forth by us as *Amicus Curiae*

The Statutes Involved

Section 781-b of the Penal Law of the State of New York provides as follows:*

> "Section 781-b. Printing or other reproduction of certain political literature.
>
> No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, *whether in favor of or against* a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such hand-

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* By L. 1965, c. 1031, eff. September 1, 1967, this statute has been superceded by Section 457 of the Election Law of the State of New York, in which the identical language is employed. Since the appellant has referred to the prior section in his brief, *amicus* will continue to do likewise herein with the understanding that the references are applicable to the more recent enactment.

bill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also so printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitutte a misdemeanor.

The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal." (Emphasis supplied.)

Section 782 of the Penal Law of the State of New York provides as follows:*

"Section 782. Penalty.

Any person convicted of a misdemeanor under this article shall for a first offense be punished by imprisonment for not more than one year, or by a fine of not less than one hundred dollars nor more than five hundred dollars, or by both such fine and imprisonment. Any person convicted of a misdemeanor under this article for a second or subsequent offense shall be guilty of a felony."

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* Now Section 458 of the Election Law of the State of New York (L. 1965, c. 1031, eff. September 1, 1967).

ARGUMENT

I.

Appellant has failed to demonstrate the presence of any special circumstances or "danger of irreparable injury 'both great and immediate'", to warrant a departure from the well-recognized doctrine of abstention and federalism.*

It is the respectful submission of *Amicus Curiae* that the United States District Court was fully justified in its conclusion that the amended complaint did not state facts sufficient to warrant the relief therein sought and that the remedies available to appellant in the State of New York are adequate to safeguard his right of free speech and free expression pursuant to the First Amendment of the Constitution of the United States and Article 1, Section 8 of the New York State Constitution.**

It is our further submission that the appellant merely seeks to have this Court decide an "abstract, hypothetical or contingent question, . . ., or to decide [a] constitutional question in advance of the necessity for its decision. . . ."

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* *Douglas* v. *City of Jeannette,* 319 U.S. 157, 163-64 (1943).

** It is noteworthy that nearly three years have elapsed since appellant's initial arrest and prosecution pursuant to Section 781-b of the Penal Law of the State of New York, *supra,* (Amended Complaint, para. "FIFTH"—[R. 2]), and nearly two years since the affirmance by the New York Court of Appeals of the order of the Appellate Term of the New York State Sureme Court exonerating him (Amended Complaint, para. "THIRTEENTH"—[R. 3]). Appellant, however, has not seen fit to avail himself of the adequate equitable procedural avenue open to him in the courts of the State of New York. (See *Bunis* v. *Conway,* 17 A D 2d 207 [1962], *appeal denied,* 17 A D 2d 1036 [1962], *appeal dismissed,* 12 N Y 2d 882 [1963]; see pages 10-11, *infra.*

Alabama State Federation of Labor v. *McAdory,* 325 U.S. 450, 461 (1945). *Accord, United Public Workers of America* v. *Mitchell,* 330 U.S. 75, 89 (1947); *Electric Bond & Share Co.* v. *Securities and Exchange Comm'n,* 303 U.S. 419, 443 (1938). In short, the appellant's position herein is frivolous and without any legitimate support from adjudicated cases.

Appellant, in his amended complaint, alleges his intention and desire to distribute in the future and "in quantities of more than a thousand copies" the anonymous leaflet he distributed in 1964 "*and similar anonymous leaflets, all prepared by and at the instance of a person other than the plaintiff;*" to do so "at any time during the election campaign of 1966 and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966." *Zwickler* v. *Koota,* 261 F. Supp. 985, 988 (1967); (Amended Complaint, para. "FOURTEENTH"—[R. 3] [Emphasis supplied]). An examination of the leaflet distributed by the appellant on October 29, 1964, and set forth in the opinion below (*Zwickler* v. *Koota,* 261 F. Supp., *supra,* at 987 [R. 5-6]), discloses that it consists primarily of excerpts from the Congressional Record concerning a statement made by Congressman Multer (then seeking re-election), as well as a comment by the writer of the leaflet with regard to the effect and purport of the Congressman's statement. Such a leaflet would not in any sense expose the writer to damages for libel, either civil or criminal. Indeed, appellant's counsel, himself, recognizes that "[a] reading of the leaflet . . . may raise a question whether it is libellous" (Brief for Appel-

lant, pp. 17-18). In *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), this Court limited state power, in a civil action brought by a public official, to an award of damages for a false statement made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not. It is apparent, from the foregoing, that a mere quotation from the Congressional Record, coupled with a brief comment thereon, referring only to the possible effect thereof, would be insufficient to bring the instant situation within the scope of the rule laid down in *New York Times Co., supra.* It is manifest, therefore, that there was no need for anonymity on the part of the writer of the leaflet which the appellant distributed, and since the appellant states in his complaint that he only intends to distribute "similar anonymous leaflets" (Amended Complaint, para. "FOURTEENTH"—[R. 3]), appellant, as previously noted, is attempting to have this Court decide "[an] abstract, hypothetical or contingent question . . ." (*Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450, 461 (1945), *supra*). Thus, it is unlike *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965) (Brief for Appellant, pp. 19, 23-26), wherein the Court stated that "[a]lthough the particular seizure has been quashed in the state courts, the continuing threat of prosecution portends *further arrests and seizures,* some of which may be upheld and all of which will cause the organization inconvenience or worse." (*Id.* at 489; emphasis supplied) In addition thereto, the appellant, in *Dombrowski, supra,* "attacked the good faith of the appellees in enforcing the statutes, claiming that they have invoked, and threaten to continue to invoke, criminal process without any hope of ultimate success, but only to discourage appellants' civil rights activities." (*Id.* at 490.)

It is significant that in the court below, it was stated that "[t]he plaintiff does not accuse Aaron E. Koota, the District Attorney of Kings County, New York, of bad faith. Rather, he praises him as a 'diligent and conscientious public officer' . . ." (*Zwickler* v. *Koota,* 261 F. Supp. 985, 988 (1967), *supra;* (Amended Complaint, para. "FOURTEENTH" —[R. 3]).

It is respectfully submitted, therefore, that the appellant has failed to supply any special circumstances or danger of irreparable injury "both great and immediate" (*Dombrowski* v. *Pfister, supra; Keyishian* v. *Board of Regents,* 385 U.S. 589 [1967]; and *Baggett* v. *Bullitt,* 374 U.S. 360 [1964]), to justify this Court's exercise of its equitable discretion. In *Dombrowski* v. *Pfister,* 380 U.S. 479 [1965], *supra,* Mr. Justice Brennan aptly stated at 484-85:

> "* * * [T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere *possibility* of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings. In *Douglas* v. *City of Jeannette,* 319 U.S. 157, for example, the Court upheld a district court's refusal to enjoin application of a city ordinance to religious solicitation, even though the ordinance was that very day held unconstitutional as so applied on review of a criminal conviction under it. *Murdock* v. *Pennsylvania,* 319 U S 105. . . . [T]he Court has found no special circumstances to warrant cutting short the

> normal adjudication of constitutional defenses in the course of a criminal prosecution. In such cases it does not appear that the plaintiffs 'have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court.' *Douglas* v. *City of Jeanette, supra,* [319 U.S.] at 164."

And in the same case, the Court, in affording to the petitioners equitable relief in the Federal jurisdiction, noted that:

> ". . . [T]he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of of constitutional rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury.
>
> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms." (*Id.* at 485-86.)

And continuing, it was observed that:

> "When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights." (*Id.* at 486.)

It is noteworthy that in the State of New York the appellant had and continues to have available to him equitable procedures for complete determination of whatever rights he may deem to have been violated by the statute involved herein. In the instant case, however, as will be amply shown in Argument II, *infra,* of this brief, Section 781-b of the Penal Law, *supra,* is a valid exercise by the State of New York of its obligation to insure the continuance of good government by proper election.

It is also noteworthy that in the instant case, it was noted by the court below (*Zwickler* v. *Koota,* 261 F. Supp. 985 [1967] *supra,* at 993):

> "There is available to the plaintiff a state remedy *short of asserting defenses in a criminal prosecution.*" (Emphasis supplied.)

In *Bunis* v. *Conway,* 17 A D 2d 207 [1962], *appeal denied,* 17 A D 2d 1036 [1962], *appeal dismissed,* 12 N Y 2d 882 [1963], *supra,* petitioner sought a declaratory judgment for an adjudication that the book "Tropic of Cancer" by Henry Miller was not "obscene" within the meaning of Section 1141 of the Penal Law of the State of New York. The court in *Bunis, supra,* significantly stated as follows:

> "An action for a declaratory judgment is the appropriate remedy for the determination of a justiciable controversy, where the plaintiff is in doubt as to his legal rights and wishes to avoid the hazard of taking action in advance of the determination of such rights (*James* v. *Alderton Dock Yards,* 256 N.Y. 298, 305).
>
> "It is the settled law that an action for a declaratory judgment will lie 'where a constitutional ques-

> tion is involved or the legality or meaning of a statute is in question and no question of fact is involved' (*Dun & Bradstreet* v. *City of New York,* 276 N.Y. 198, 206). The remedy of declaratory judgment is available, not only where the validity of a statute is in question, but also where its construction or its application to an undisputed set of facts is in question (*New York Foreign Trade Zone Operators* v. *State Liq. Auth.,* 285 N.Y. 272)." (*Id.* at 208.)*

It is obvious from the foregoing that the appellant may seek full and prompt determination of his First Amendment rights and privileges in the courts of the State of New York by means of an action for a declaratory judgment and for injunctive relief. Appellant, we submit, has urged quite properly (Brief for Appellant, pp. 22-27) that an expeditious determination of rights guaranteed by the First Amendment of the United States Constitution is imperative. Insofar as the appellant is concerned, however, it is respectfully submitted that his zeal for expedition has been more honored in the breach than in the observance. Although more than a year has elapsed since the determination below (September 19, 1966), nearly two years since the determination of the New York Court of Appeals exonerating appellant (Amended Complaint, para. "THIRTEENTH" [R. 3]) and nearly three years since appellant's initial arrest and prosecution pursuant to Penal Law, Section 781-b, *supra* (Amended Complaint, para. "FIFTH" [R. 2]), appellant has done nothing to seek redress of his alleged grievances against this section of the Penal Law,

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* In view of the nature of the leaflet distributed by the appellant in October, 1964 (*Zwickler* v. *Koota,* 261 F. Supp. 985 [1967], *supra,* at 987), it is respectfully urged that the appellant would not prevail on the merits under New York procedures.

by invoking the equitable jurisdiction of the courts of the State of New York. It is, thus, our respectful submission that the primary responsibility for delay in the ultimate adjudication of the substantive issues raised herein rests primarily with the appellant. We emphasize, moreover, that his failure to promptly invoke his state remedies have been occasioned by the lack of merit in his attack upon Section 781-b of the Penal Law, *supra* (see Brief of *Amicus Curiae,* Argument II, *infra*), and that by failing to take advantage of state procedures open to him, he now attempts to "traipse" through this Court in order to have it entertain a non-meritorious and frivolous claim involving nothing more than a subject which, in its present posture, is merely one of academic interest.

There is, therefore, no compelling reason for departing from the well-established doctrine of "Federalism" which was reiterated in *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), *supra,* and has been consistently followed by this Court, except where there are present unusual and exceptional circumstances. (*Douglas* v. *City of Jeannette,* 319 U.S. 157 [1943], *supra, Watson* v. *Buck,* 313 U.S. 387 [1941]; *Beal* v. *Missouri Pac. R. Co.,* 312 U.S. 45 [1941]; *Speilman Motor Sales Co.* v. *Dodge,* 295 U.S. 89 [1935]; *Fenner* v. *Boykin,* 271 U.S. 240 [1926].)

And equally significant is the statement made by Mr. Justice White in *Baggett* v. *Bullitt,* 377 U.S. 360 (1964), *supra,* at 375:

> "The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. As-

> certainment of whether there exists the 'special circumstances', (citation omitted), prerequisite to its application must be made on a case-by-case basis."

In view of the fact that appellant may secure prompt adjudication of his grievances in the courts of the State of New York (Section 3001, N.Y. Civil Practice Law and Rules; *De Veau* v. *Braisted,* 5 AD 2d 603 [1958] *aff'd,* 5 NY 2d 236 [1959], *aff'd,* 363 U.S. 144 [1960]; *Bunis* v. *Conway,* 17 AD 2d 207 [1962], *appeal denied,* 17 AD 2d 1036 [1962], *appeal dismissed,* 12 NY 2d 882 [1963], *supra;* see cases annotated in 10 ALR 3rd, 727), it is our respectful submission that appellant has not presented a scintilla of proof that would warrant a departure by this Court from the well-recognized doctrine of abstention.

There is still another reason for adhering to the doctrine of abstention in the instant case. Unlike the unusual circumstances present in *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), *supra* (wherein the complaint alleges a pattern of prosecution undertaken in bad faith, with little hope of success save for the harassment of members of a Civil Rights Organization dedicated to the amelioration of the condition of the socially and economically-disadvantaged), the amended complaint in the instant case contains no such allegation, but, on the contrary (Amended Complaint, para. "EIGHTEENTH" [R. 4]) alleges that by reason of appellant's arrest and prosecution, commencing in October of 1964, he fears future prosecutions in the County of Kings for the reason that, in appellant's own words, "[the District Attorney of Kings County] is a diligent and conscientious public officer and pursuant to his duties intends or will again prosecute the plaintiff for his acts of distribution

as aforesaid." (Amended Complaint, para. "EIGHTEENTH" [R. 4]. Nowhere in the amended complaint is there to be found any direct threat of immediate prosecution, nor any allegation of bad faith on the part of the appellee. It is respectfully submitted, therefore, that in the absence of exceptional and unusual circumstances, not here present, the court below properly exercised its discretion in dismissing the complaint. (*Watchtower Bible and Tract Society* v. *City of Bristol,* 24 F. Supp. 57, 59 [Dist. Ct., Conn. 1938] *aff'd,* 305 U.S. 572 [1938]; *Douglas* v. *City of Jeannette,* 319 U.S. 157, 164 [1943] *supra; Spielman Motor Sales.Co.* v. *Dodge,* 295 U.S. 89, 95, 96 [1935], *supra.*)

Appellant attempts to justify his failure to avail himself of the equitable remedies available to him in the courts of the State of New York for a period of nearly three years upon the ground that (Brief for Appellant, p. 20) "[u]nder New York law the remedy of declaratory judgment is a discretionary one (citations omitted)." However in the following sentence the appellant concedes that "[t]he exercise of equitable jurisdiction by a District Court is likewise discretionary" (Brief for Appellant, p. 20). Thus, appellant, we submit, has offered no valid reason for ignoring the state *equitable procedures* available to him as previously noted.

Since "discretionary application" is the key to both state and federal exercise of the remedies afforded, the appellant was not justified in avoiding earlier possible relief under state procedures in the belief that the exercise of discretion by a Federal Court would be more profitable. Therefore, the appellant's chilling in the exercise of his rights, which he maintains (Brief for Appellant, p. 22), has been self-imposed.

Appellant states at page 21 of his Brief that:

> "Zwickler should not be required to be martyr to seek relief only after a conviction. Under this statute, it will be recalled, a second conviction for handing out a leaflet is a felony."

However, the appellant was exonerated by the courts of the State of New York of any criminal liability for such distribution and, hence, his present status would render him liable only to a misdemeanor upon a first conviction.

The cases upon which the appellant relies are inapposite. In *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965) *supra,* as previously noted, the petitioners and the Civil Rights Organization to which they belonged had been the subject of considerable harassment including an invalid search and seizure and there was, according to the complaint, threats of future prosecutions in bad faith instituted for the sole purpose of harassment, without any hope of success.

In *Baggett* v. *Bullitt,* 377 U.S. 360 (1964) *supra,* the petitioners, "members of the faculty, staff and student body of the University of Washington . . . brought this *class* action asking for a judgment declaring unconstitutional two Washington statutes requiring the execution of two different oaths by state employees and for an injunction against the enforcement of these statutes by appellees. (*Id.* at 361; emphasis supplied.)

It is to be noted at the outset that the instant case does not involve a representative or class action, but was brought by the appellant in his individual capacity and, thus, his position in this Court must be evaluated solely upon his status as evinced from an analysis of the amended complaint in the light of the decisions of this Court.

In *Baggett, supra,* the statutes involved were found to be unconstitutional on their face. In the instant case, however, Section 781-b of the Penal Law, *supra,* does not suffer, we submit, from any such infirmity (Brief of *Amicus,* ARGUMENT II, *infra*).

It is respectfully submitted that *Baggett* v. *Bullitt, supra,* does not inure to appellant's benefit but, on the contrary, the Court in that case declined to apply the doctrine of abstention, stating:

> "It is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty. Abstention does not require this." (377 U.S., *supra,* at 378.)

In the case of *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967), *supra* (Brief for Appellant pp. 19, 21, 26) the petitioners, members of the faculty of the University of the State of New York sought a declaratory judgment to invalidate certain state statutes and administrative regulations designed to "prevent the appointment or retention of 'subversive' persons in state employment (*Id.* at 592). The Court in holding that the doctrine of abstention should not be applied, stated:

> "In the light of the intricate administrative machinery for its enforcement, this is not surprising. The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient *in terrorem* mechanism. It would be a bold teacher who would not stay as far as possible from utterance or acts *which might jeopardize his living* by enmeshing him in this intricate machinery." (*Id.* at 601; emphasis supplied.)

It is respectful submission of *Amicus Curiae* that neither *Baggett* v. *Bullitt*, 377 U.S. 360 (1964), *supra* and *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), *supra*; (Brief for Appellant pp. 19, 21, 26) involve an action to enjoin a state prosecutor from enforcing a state law. It is our further submission that these cases are completely inapposite to the issues presented in the case at bar and that the dismissal of the amended complaint in the court below was a proper exercise of judicial discretion. (*Douglas* v. *City of Jeannette*, 319 U.S. 157 [1943], *supra*, cited with approval in *Dombrowski* v. *Pfister*, 380 U.S. 479, 485 [1965], *supra*; *Harrison* v. *NAACP*, 360 U.S. 167 [1959].)

Mention must also be made of *Evers* v. *Dwyer*, 358 U.S. 202 (1958), upon which appellant also relies. (Brief for Appellant, pp. 21-22.) In *Evers, supra*, the facts were strong enough to indicate the existence of special circumstances or "danger of irreparable injury 'both great and immediate'" (*Douglas* v. *City of Jeanette*, 319 U.S. 157, 163-64 [1943], *supra*), to have warranted the relief sought, following an action to declare the ordinance invalid. As the entire Court so pertinently declared:

> "A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, *a substantial, immediate, and real interest* in the validity of the statute which imposes the disability." (*Id.* at 204; emphasis supplied.)

It must be emphasized that the right sought to be enforced by the aggrieved party in *Evers, supra*, was one so basically fundamental that it tended to destroy the philosophy of equality etched into the Bill of Rights, regardless of race, color or creed.

In sum, it is the respectful submission of *Amicus Curiae* that Section 781-b of the Penal Law of the State of New York, *supra,* is constitutional (ARGUMENT II, infra); that appellant has failed to establish such "special circumstances" or threat of irreparable injury to warrant granting of the relief prayed for in the amended complaint; that appellant has had and continues to have an adequate equitable procedural avenue open to him in the courts of the State of New York; and that any delay in the adjudication of the substantive issues raised by the appellant were occasioned by his own laches over a considerable period of time.

II.

Section 781-b of the Penal Law of the State of New York, *supra,* does not violate the constitutional guarantees of freedom of speech and of the press (First Amendment, Constitution of the United States and Article I, Section 8, New York State Constitution). The statute is a proper exercise of the State's police power, being neither vague, imprecise nor overly broad.

In order to support the position taken by *Amicus Curiae* in ARGUMENT "I", *supra,* i.e., that the abstention doctrine was properly applied by the court below, it becomes necessary to emphasize the merit of the statute herein involved. Accordingly, we respectfully reiterate that any contention that Section 781-b of the Penal Law of the State of New York denigrates fundamental rights, is without merit.

In *Talley* v. *California,* 362 U.S. 60 (1960), *supra,* relied upon by the appellant, this Court invalidated a municipal

ordinance of Los Angeles making it a criminal offense to distribute "any hand-bill, in any place under any circumstances", unless it had printed on the cover, or face, the name and address of the person ". . . who printed, wrote, compiled or manufactured" it, and of the "person who caused the same to be distributed." Although counsel supporting the validity of the ordinance contended that it was aimed at providing a method of identifying persons responsible for fraud, false advertising and libel, the Court was not impressed with the argument thus advanced. It is significant that Mr. Justice Black, in the majority opinion, stated (*Id.* at 64):

> ". . . [T]he ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose. *Therefore we do not pass on the validity of an ordinance limited to prevent these or any other evils.* This ordinance simply bars *all* handbills under *all circumstances anywhere* that do not have the names and addresses printed on them in the place the ordinance requires." (Emphasis supplied.)

The comment by Mr. Justice Black (*Id.* at 64) regarding the important role played in history by anonymous publications, does not represent the majority view and, in that respect, must be deemed to be *dicta.*

It is apparent that the Court's condemnation of the ordinance was predicated upon its "broadness", and, so fashioned, tended "to restrict freedom to distribute information and thereby freedom of expression" (*Id.* at 64).

Mr. Justice Harlan, in a separate concurring opinion, condemned the ordinance for its failure to limit its purpose and stated that:

> "In the absence of a more substantial showing as to Los Angeles' actual experience with the distribution of obnoxious handbills, such a generality is for me too remote to furnish a constitutionally acceptable justification for the deterrent effect on free speech which this *all-embracing ordinance* is likely to have." (*Id.* at 66-67.) (Emphasis supplied.)

It is noteworthy that in *Talley, supra,* the dissenting opinion rendered by Mr. Justice Clark, joined in by Mr. Justice Frankfurter and Mr. Justice Whittaker, made reference to corrupt practices acts, similar to Section 781-b of the Penal Law, *supra,* which outlaw the distribution of anonymous publications with reference to political candidates, and sought to uphold the validity of the Los Angeles ordinance in issue in *Talley, supra,* by comparing it with such acts whose validity "have expressed the overwhelming policy of the Nation" (*Id.* at 70).

Thus, a statute similar to the section of law now in issue before this Court, was not considered in *Talley, supra,* and thereby that case has no applicability herein.

In *People* v. *Mishkin,* 17 AD 2d 243 (1962), also relied upon by the appellant herein, and affirmed by the New York Court of Appeals on December 3, 1964 (15 NY 2d 671), the statute held unconstitutional was Section 330, Subdivision 2, of the General Business Law. That section provided that every publication printed after September 1, 1956 (other than newspapers, magazines or other periodicals for which separate provision is made) shall "conspicuously have imprinted on the cover, title, or copyright page, or at the end of the publication, the true name and address of the publisher or printer". The court invalidated the statute on the authority of *Talley* v. *California, supra.*

However, in the *per curiam* opinion in *Mishkin,* the court stated (17 AD 2d at 244):

> "The District Attorney suggests that the statute may be found constitutional if its application is limited to obscene publications for there would be a purpose in facilitating the discovery of the publisher. *But the statute itself is not so limited, and there is nothing to indicate that this was the legislative purpose. We do not reach the question whether such a purpose would validate the statute.*" (Emphasis supplied.)

Following the decision in *Mishkin,* 17 AD 2d 243, *supra,* on November 27, 1962, Section 330, Subdivision 2, of the General Business Law was amended to read as follows:

> "2. Every publication printed or reprinted after September first, nineteen hundred sixty three which is so composed or illustrated as a whole as to be devoted to the description or portrayal of bondage, sadism, masochism or other sexual perversion or to the exploitation of sex or nudity and published in this state shall conspicuously have imprinted on the cover, title or copyright page or at the end of the publication the true name and address of the publisher or printer. As amended L. 1963, c. 703, eff. September 1, 1963."

This significant change in the legislative enactment of Section 330, Subdivision 2, of the General Business Law, was an expression of the Legislature's belief that such a change, since it was *limited* in range, would not be criticized in view of similar legislation with regard to corrupt practices outlawing the distribution of anonymous publications with reference to the *limited* area of political candi-

dates and political issues. The scope of the new change in Section 330, Subdivision 2, of the General Business Law, *supra,* has been limited so as to include "[e]very publication" dealing with "obscenity" in lieu of the previous wording of the statute which dealt with *all* publications other than newspapers, magazines or other periodicals.

Broadness was again the basis for the Court's determination in *Lovell* v. *Griffin,* 303 U.S. 444 (1938), and *Schneider* v. *New Jersey* (*Town of Irvington*), 308 U.S. 147 (1939). In *Lovell, supra,* the Court invalidated an ordinance which prohibited *all* distribution of literature at *any time or place in Griffin, Georgia* without a license on the ground that so broad an interference was unnecessary to accomplish legitimate municipal aims. As Mr. Chief Justice Hughes stated in *Lovell* (303 U.S., *supra,* at 451):

> ". . . The ordinance is not limited to 'literature' that is obscene or offensive to public morals or that advocates unlawful conduct. There is no suggestion that the pamphlet and magazine distributed in the instant case was of that character. *The ordinance embraces 'literature' in the widest sense.*" (Emphasis supplied.)

In *Schneider, supra,* the Court in reviewing ordinances of four different municipalities which either banned or imposed prior restraints upon the distribution of handbills stated (by Mr. Justice Roberts):

> "In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preference or beliefs respecting matters of public convenience may well support regulation directed at other personal

> activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulations of the free enjoyment of the rights." (308 U.S., *supra,* at 161.)

It is thus crystal-clear that *Lovell* v. *Griffin, supra,* and *Schneider* v. *Irvington, supra,* are readily distinguishable from the facts of the instant appeal for in neither case was the United States Supreme Court called upon to determine the issue of "anonymity." The holdings in these cases were reaffirmed in *Jamison* v. *Texas,* 318 U.S. 413 (1943).

In *Shelton* v. *Tucker,* 364 U.S. 479 (1960), relied upon by appellant (Brief for Appellant, p. 9), the United States Supreme Court condemned an Arkansas statute which compelled every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing *without limitation* every organization to which he had belonged or regularly contributed within the preceding five years. It is noteworthy that the statute under judicial scrutiny in *Shelton, supra,* was one which again encompassed a broad area. Mr. Justice Stewart, in speaking for the majority, significantly stated at pages 487-88:

> "The question to be decided here is not whether the State of Arkansas can ask certain of its teachers about all their organizational relationships. It is not whether the State can ask all of its teachers about certain of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizations they belong to, or how much time they spend in

> organizational activity. The question is whether the State can ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period. *The scope of the inquiry required by Act 10 is completely unlimited.* The statute requires a teacher to reveal the church to which he belongs, or to which he has given financial support. It requires him to disclose his political party and every political organization to which he may have contributed over a five-year period. *It requires him to list, without number, every conceivable kind of associational tie—social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness.*
>
> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." (Emphasis supplied.)

And continuing at 490, Mr. Justice Stewart declared:

> "The *unlimited and indiscriminate sweep* of the statute now before us brings it within the ban of our prior cases. The statute's *comprehensive* interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." (Emphasis supplied.)

Amicus Curiae is mindful of the fact that a State may not unreasonably make any law abridging freedom or liberty of speech or the press (First and Fourteenth Amend-

ments to the United States Constitution; Article 1, Sections 6 and 8, of the New York State Constitution). (See *Gitlow* v. *New York*, 268 U.S. 652, 666 [1924]; *Whitney* v. *California*, 274 U.S. 357, 373 [1927]; *Grosjean* v. *American Press Co.*, 297 U.S. 233, 243, 244 [1936].) The right to "speak freely" is the foundation of democratic government, and as expounded by Mr. Justice Holmes in *United States* v. *Schwimmer*, 279 U.S. 644, 654-55 (1929) (dissenting opinion), "[I]f there is any principle of the [U.S.] Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate." Yet it is significant that until about 1922, the United States Supreme Court accepted the view that the Fourteenth Amendment did not make the First Amendment binding on the states. (See *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 543 [1922].) In 1925, the Court in *Gitlow* v. *New York, supra*, at 666, "ventured the tentative assumption that the 'freedom' of speech protected by the First Amendment was included in the 'liberty' which the Fourteenth Amendment required the states to respect." (See DUMBAULD, BILL OF RIGHTS AND WHAT IT MEANS TODAY 133 [1957].) Eventually, through the process of "incorporation" or "absorption," all of the First Amendment liberties were made binding against the states. In the area of free speech, the case of *West Virginia State Board of Education* v. *Barnett*, 319 U.S. 624, 633 [1943], is particularly noteworthy as showing just when a state may not be permitted to censor or suppress expression of opinion. Thus, although a flag salute was involved, it was the Court's view that "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the indi-

vidual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." (*Id.* at 634.)

Yet, notwithstanding the sacrosanct nature of First Amendment freedoms, particularly the one concerned with freedom of expression, a state may, in the exercise of its police power, place reasonable regulations and restrictions upon this constitutional guarantee in the interest of public order. (See *Davis* v. *Massachusetts,* 167 U.S. 43, 47 [1897]; *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 439 [1911]; *Schenck* v. *United States,* 249 U.S. 47, 52 [1919]; *Gitlow* v. *New York,* 268 U.S. 652, *supra,* at 667; *Whitney* v. *California,* 274 U.S. 357, 371 [1927] *supra; Cantwell* v. *Connecticut,* 310 U.S. 296, 304 [1939].) It is particularly significant that in *Whitney, supra,* Mr. Justice Brandeis, in a concurring opinion, recognized that free speech is not an absolute right. (274 U.S. 357 [1927], *supra,* at 373.)

Also:

> "No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far." (Mr. Justices Black and Douglas in *Board of Education* v. *Barnette,* 319 U.S. 624 (1943), *supra,* at 643.)

In a more recent case, this Court, in a majority holding, rejected the argument that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." (See *Adderley* v. *Florida,* 385 U.S. 39, 47-48 [1966] [Black, J.].)

To paraphrase Mr. Chief Justice Hughes, the excesses of free speech are apt to destroy free speech itself, unless properly fettered. (See *Cox* v. *New Hampshire*, 312 U.S. 569, 574 [1941].)

We also quote as particularly apt the oft-quoted language of Mr. Justice Holmes in *Schenck* v. *United States*, 249 U.S. 47 (1919), *supra*, wherein he said:

> "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction from uttering words that may have all the effect of force." (*Id.* at 52.)

With regard to the purpose intended by the passage of Section 781-b of the Penal Law, several states have penal statutes, conceived, as is our statute, to elevate political utterances to a level of respectability, sincerity, accuracy, and fair criticism, so necessary in a form of government such as ours. Some of these statutes are as follows:*

KANSAS GENERAL STATUTES, 1949 (Elections—Corrupt Practices):

> "SECTION 25-1714:
>
> *Anonymous publication criticizing personal character or political action of candidate; penalty*
>
> Whoever intentionally writes, prints, posts or distributes, or causes to be written, printed, posted, or distributed, a circular or poster which is designed or tends to injure or defeat any candidate for nomination or election to any public office, by criticizing

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* In *Talley*, 362 U.S. 60 (1960), *supra*, at 70, the Court indicated that there are 36 states with statutes prohibiting the anonymous distribution of material relating to elections.

his personal character, or political action, unless there appears upon such circular or poster in a conspicuous place either the names of the chairman and secretary or of two officers of the political or other organization issuing the same, or some voter who is responsible therefor, with his name and residence, and the street number thereof, if any, shall be punished by imprisonment by not more than six months.

(L. 1913, ch. 189, sec. 5; April 30; R.S. 1923, Section 25-1714.)"

(This statute was held constitutional in *State* v. *Freeman,* 143 K. 315, 316, 318, 55 P. 2d 362.)

MINNESOTA STATUTES ANNOTATED, CORRUPT PRACTICES, Book 14A:

"SECTION 211.08: *Campaign literature matter must include names*

Any person or committee who shall publish, issue, post, or circulate, or cause to be published, issued, posted, or circulated, otherwise than in a newspaper, as provided in section 211.03, any literature, campaign material, or any publication, including but not limited to cards, pamphlets, flyers, signs, banners, leaflets, tending to influence voting at any primary or election which fails to bear on the face thereof the name and address of the author, the name of the candidate in whose behalf the same is published, issued, posted or circulated, and any person, firm, corporation or committee who shall knowingly make or publish or cause to be published, any false statement in relation to any candidate or proposition to be voted upon, which statement is intended to or tends to affect any voting at any primary or election, shall be guilty of a misdemeanor; provided, nothing herein contained shall be construed as modi-

fying or repealing any of the provisions of section 210.11. As amended, Laws, 1963, c. 861, section 6."

PAGE'S OHIO REVISED CODE ANNOTATED:

"SECTION 3599.09 (*Elections*)

(A) No person shall write, print, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence address of the chairman or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefore, except that when such publication by the regularly constituted central or executive committee of a political party, organized as provided in Chapter 3517 of the Revised Code, it shall be sufficiently identified if it bears the name of the committee and its chairman. No person, firm, or corporation shall knowingly print or reproduce any notice, placard, dodger, advertisement, sample ballot, or any other form of publication in violation of this section.

A candidate shall not be required to place his address on literature promoting his own candidacy.

(B) . . . . [Applicability to Radio and TV material covering same subject matter.]

(History: 129 v 244, Section 1, Eff. 10-16-61; 130 v H351, Section 1, Eff. 8-19-63.)"

PURDON'S PENNA. STATUTES ANNOTATED, TITLE 25:

"SECTION 3546: *Anonymous Publication—libel*

Any person who writes, prints, posts or distributes, or causes to be written, posted or distributed, a circular or poster, cartoon, or other written or printed paper which is designed or tends to injure or defeat any candidate for nomination or election to public office, by reflecting on his personal character or political actions, unless the same shall be published in a newspaper avowed responsible therefor, or unless there appears on such circular, poster, cartoon or paper, in a conspicuous place, either the names of the chairman and secretary, or at least the names of at least two officers of the political or other organization issuing the same, or the name of some duly registered elector with description of his election district, as responsible therefor, shall be sentenced to pay a fine not exceeding five hundred ($500) dollars, or to undergo an imprisonment of not more than six (6) months, or both, in the discretion of the court, and if the statements are untrue, the person so offending shall also be guilty of libel and subject to criminal prosecution and civil action therefor. 1937, June 3, P.L., 1933, article XVIII, Section 1846."

The validity of the Pennsylvania statute hereinabove set forth was upheld in *Commonwealth* v. *Evans,* 156 Pa. Super. 321, 325-27, 40 A. 2d 137, 138-39 (1945), *supra,* wherein Judge Reno in expressing with great clarity the underlying rationale for such legislation stated:

"The purpose of the statute is . . . obvious. It compels persons who charge candidates with private frailties or political misconduct to avow responsibility for their assertions. It prohibits campaigning in a cloak of anonymity; it compels a writer, exercising his right to the freedom of the press, to dis-

close his identity and assume responsibility just as a speaker, exercising his right of free speech, identifies himself by the very act of articulation, and, *ipso facto,* becomes responsible for his utterance. *It is an attempt to raise the ethical standards of political discussion, to promote fair play, and fair competition in politics, to banish cowards from the political arena, and extirpate the dirty business of surreptitious character assassination.* The section represents the views of both major political parties of the Commonwealth, and even the judiciary is not so remote from the realities of political life that it cannot recognize it as wholesome and desirable legislation.

"The power of the legislature in the premises is wholly free from doubt. *The section of the Bill of Rights which guarantees the effably precious right of literary expression does not contain one syllable which protects anonymous writers.* The Constitution shields only those who openly and in good faith publicly examine the official and private conduct of candidates for public office (citing cases). *The Constitution itself imposes responsibility as a condition to the exercise of the right, and that condition empowers the legislature to enact law under which identity must be disclosed and responsibility assumed.* 11 Am. Jur., Constitutional Law, Sec. 321 This is the real purpose of the statute. *It does not deny any person his constitutional right to write or print information concerning a candidate.* The section merely requires disclosure of the identity of the writer or publisher, that is, *it requires only the open assumption of the responsibility imposed by the Constitution. The appellee's contention when exposed to examination in the light of the Constitution, becomes a specious plea for the exercise of a right*

without acknowledging the existence of a correlative duty.

"The legislation is amply sustained by the police power of the Commonwealth. Under that power, the legislature may certainly promote clean campaigning and pure elections by regulations that have a real and substantial relation to the object to be attained, and which merely result in such a limited restraint upon the activities of candidates for public office, and of their advocates, *as may be deemed necessary to prevent the electorate from being unduly influenced by prejudicial matter which, whether true or false, does not emanate from a responsible source.** Upon this power statutes forbidding participation in political activities by civil service officers and corrupt practices acts have been sustained though obviously they do not limit to a degree the exercise of the constitutional liberty of free expression. 11 Am. Jur., Constitutional Law, Sec. 319. The police power may be employed to place reasonable restraints upon the exercise of the right of expression. *Com.* v. *Widovich* (295 Pa. 311, 145 A. 295). It cannot be doubted that a power that possesses sufficient vitality to require the newspapers of the Commonweath to publish the names of the persons who are responsible for their editorial and managerial policies (*Com.* v. *Short,* 228 Pa. 279, 77 A. 449) can also reach the writers of fugitive political circulars and compel them to acknowledge their responsibility." (Emphasis supplied.)

In accord, Chronicle & Gazette Publishing Company, Inc. v. *Attorney General* (New Hampshire), 48 A. 2d 478 (1946),

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* It is respectfully submitted that it is the danger of misleading the electorate by irresponsible sources which creates the greatest need for such a statute. (See text, *infra.*)

in which Justice Kenison cited with approval the opinion in *Evans, supra.*

In *Garrison* v. *Louisiana,* 379 U.S. 64 (1964) this Court held that the constitutional guaranty of free speech is violated by a state statute which sanctions punishment of truthful criticism of public officials if made with actual malice, defined to be "hatred, ill will, or enmity or a wanton desire to injure", and of false statements made with ill will, even though they are not made with knowledge of their falsity or in reckless disregard of whether they are true or false. Thus, *Garrison, supra,* by limiting state power to impose criminal sanctions for criticism of the official conduct of public officials thereby applied the rule laid down in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), *supra,* which limited state power, in a civil action brought by a public official, to an award of damages for a false statement made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

The Louisiana Criminal Defamation statute (La. Rev. Stat. 1950, Title 14) denigrated in *Garrison, supra,* was not analogous to the statute in the instant appeal for in *Garrison* the gravamen of the charge concerned itself with the right of one to openly make statements which might tend to injure another's private or public reputation, whereas in the present case the pertinent issue revolves about *anonymity of political expression "whether in favor of or against* (Section 781-b of the Penal Law, *supra*)".

It cannot be said that the language in the instant statute, "whether in favor of or against," is without significance. It spells out the basic meaningful purpose of the statute as one promulgated to protect the public, as a whole, from ir-

responsible expression in matters of election and political information and conduct (although it also affords to the person maligned the opportunity of knowing the identity of his libeller).

It is obvious that this unique New York statute of a purely political nature is designed to assure a sound and stable government, an end which cannot yield to possible false or baseless statements of a political type which are anonymously written, notwithstanding that such statements may even be praiseworthy.

Thus, Mr. Justice Brennan, speaking for the majority in *Garrison*, succinctly stated:

> "The use of calculated falsehood, however, would put a different case on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as *an effective political tool to unseat the public servant or even topple an administration.* Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col L Rev 1085, 1088-1111 (1942). *That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.* Calculated falsehood falls into that class of utter-

> ances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .' *Chaplinsky* v. *New Hampshire,* 315 US 568, 572, 86 L ed 1031, 1035, 62 S Ct 766. *Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.''* (379 U.S., *supra,* at 75, emphasis supplied.)

Certainly, then, at least with regard to the knowingly false statement and the false statement made with reckless disregard of the truth, *which do not enjoy constitutional protection,* (Brennan, J. in *Garrison, supra,* at 75), the utterer, garbed in the cloak of anonymity, ought not to be heard to complain if his identity is demanded since no right of his would be violated. It would thus appear that the unidentified utterer of statements which are either in the form of twisted and perverted conclusions, or are designed to influence the electorate, ''whether in favor of or against,'' should not be afforded any other treatment or placed in any more advantageous position. Political expression must not be free from restraints; otherwise dangerous, distorted and irresponsible views and philosophies may be foisted upon an unwary public with devastating effect simply because the foreboding spectre of anonymity would leave unchallenged baseless criticism. Such criticism, if unchecked, would encourage further onslaughts with a corroding result upon a society steeped in democratic principles. This same destructive effect would also be possible if unreliable, though praiseworthy, statements be ''seeped through'' anonymously to the public, thereby making possible the voting into authority of dangerous or in-

effectual persons or matters.* It is conceivable, therefore, that permitting anonymous political expression in violation of the statute now before this Court might very well have the deleterious consequence of seriously undermining cherished liberties, other than freedom of expression.

Any contention that the cases of *Garrison,* 379 U.S. 64 (1964), *supra,* and *New York Times,* 376 U.S. 254 (1964), *supra,* have "watered down" the need to reject anonymity in political expression is neither apparent nor real. It cannot be inferred that the rules prescribed in these cases limiting state power with regard to civil and criminal sanctions now endorse anonymity. Rather, these cases emphasize the need to tear away the cloak of anonymity in at least the proscribed limited areas. Otherwise, "limit" would take on the incompatible meaning of "destroy", by granting an illusory right to the person defamed by a calculated falsehood. More vital indeed is the need for the electorate, *as a whole,* to know if the purveyor of expression, within the ambit of Section 781-b of the Penal Law, *supra,* is worthy of belief or not, than is the concern of whether any possible false statement, maliciously or recklessly made, has personally injured any *one* person, for only in that way will such expression become the essence of self-government (*Garrison* v. *Louisiana,* 379 U.S. 64 (1964), *supra,* at 75). Anonymity begets fabrication and hampers the dissemination of credible information regarding the merits of political candidates and political and election matters. Multiply this throughout the Nation, and the need for disclosure becomes manifest.

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* See generally, Note, *Avoidance of an Election or Referendum When Electorate Has Been Misled,* 70 Harv. L. Rev. 1084-89 (1957).

It must be emphasized again that the instant statute is designed to protect the citizenry not only with regard to obnoxious election and political literature, but, more important, against the dissemination of misleading information concerning matters inseparably entwined with the elective franchise. The statute in no wise proscribes anonymity in printing, publishing, reproducing or distributing in quantity, any "handbill, pamphlet, circular, post card, placard or letter" in matters *unrelated* to elections. The statute, therefore, not being overly broad, and intended to assure insofar as possible, an intelligent and better-informed electorate, does not unduly interfere with free expression. The appellant points out that in *Schneider* v. *New Jersey* (*Town of Irvington*), 308 U.S. 147 (1939), *supra,* this Court had before it "the question of the balancing of interests" (Brief for Appellant, p. 15). It is significant that the "balancing of interests" test denies that any speech has an absolute right of protection under the First Amendment. By this test, "conduct is regulated in the interest of public order," so that it becomes necessary to allow the operation of a regulation albeit there will result an "indirect, conditional, partial abridgement of speech." (See *American Communications Assn.* v. *Douds,* 339 U.S. 382, 399 [1950].)* The courts in applying this new formula would be required, in each case, to "balance individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression." (See Emerson, *Towards a General Theory of the First Amendment,* 72 Yale L.J. 877, 912 [1963].)

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* It was in *Douds* that Mr. Chief Justice Vinson first enunciated the "balancing of interests" test.

It is respectfully submitted that it is this test which this Court must consider in upholding the statute as a proper exercise of the police power of the State of New York. The test was also recognized in *Dennis* v. *United States,* 341 U.S. 494, 510 (1951), *affirming* 183 F. 2d 201, 212 (2d Cir. 1950), wherein four of the six members of this Court, who joined in upholding the conviction, accepted Chief Judge Learned Hand's restatement of the "clear and present danger" test,* thereby diluting it into a balancing test.

That the "balancing" test has continued to maintain its effectiveness is evident from the holdings in *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 461 (1958); *Barenblatt* v. *United States,* 360 U.S. 109, 126-27 (1959); *Konigsberg* v. *State Bar,* 366 U.S. 36, 49-51 (1961); *United States* v. *Aarons,* 310 F. 2d 341, 345 (2d Cir. 1962); and *United States* v. *Miller,* 367 F. 2d 72 (2d Cir. 1966), *cert. denied,* 386 U.S. 911 (1967).

Appellant, in speaking of balancing of interests, relies upon *Schneider* v. *New Jersey* (*Town of Irvington*), 308 U.S. 147 (1939) *supra,* and attempts to equate the "remedy against the purposeful litterer," with one against a malicious libeller. (Brief for Appellant, pp. 15-16.) The appel-

* The restatement by Judge Hand is inherent in the language: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. We have purposely substituted 'improbability' for 'remoteness,' because that must be the right interpretation. Given the same probability, *it would be wholly irrational to condone future evils which we should prevent if they were immediate;* that can be reconciled only by an indifference to those who come after us." (183 F. 2d at 212, emphasis supplied.) Thus, the probable misleading of the electorate by anonymous "printing, publishing, reproducing or distributing," "justifies such invasion of free speech as is necessary to avoid the danger."

lant fails to point out that it is comparatively easier for the public to detect a litterer, whose act is hardly performed in secrecy, than it is to determine the identity of the concealed disseminator of false and misleading, or obnoxious, election or political matter.

Insofar as the statute is concerned, the need for a better-informed electorate cannot take a "back seat" to any purported right of free expression which the appellant now seeks to assert. The function of government is to prevent the exercise of rights it, itself, has bestowed upon the populace if that will interfere with, and endanger, the processes of a democratic existence which *all* its citizens are meant to enjoy. Thus, individual rights must yield to the greater rights of the electorate and so preserve good government. Certainly there is soundness in the approach which secures the "greatest good of the greatest number," * and the desire to attain that goal dictates the hesitancy to invalidate statutes as violative of constitutional mandates.

As succinctly stated by Judge Cardozo (later Mr. Justice Cardozo) in *People ex rel. Alpha P.C. Co.* v. *Knapp*, 230 N.Y. 48 (1920), at 62-63:

> "Laws are not to be sacrificed by courts on the assumption that legislation is the play of whim and fancy. . . . Our right to destroy is bounded by the limits of necessity. Our duty is to save unless in saving we pervert. *When all the world can see what sensible legislators in such a contingency would wish that we should do, we are not to close our eyes as*

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* The original synthesis of the famous English jurist and thinker, Jeremy Bentham, which had its origin in the "greatest happiness" theory and which became the motto of the Utilitarian Movement. (See Collier's *Encyclopedia*, 1967, Vol. 4, p. 61, col. 1; Vol. 23, p. 19, col. 2.)

> *judges to what we must perceive as men. This need is all the greater in fields where the law is in a stage of transition and readjustment* (citing case)." (Emphasis supplied.)

Likewise, in the case of *Gompers* v. *United States,* 233 U.S. 604 (1914), at 610, Mr. Justice Holmes gave voice to the same proposition when he wrote:

> " . . . [T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. *Robertson* v. *Baldwin,* 165 U.S. 275, 281, 282."

And:

> "When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part. *Metropolitan Casualty Ins. Co.* v. *Brownell,* 294 U.S. 580, 584 and cases cited; *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152, 153." (See *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450 [1945], *supra,* at 465-66.)

Accord, United States v. *Jin Fuey Moy,* 241 U.S. 394, 401 (1916); *In the Matter of Roosevelt Raceway* v. *Monaghan,* 9 N Y 2d 293, 303 (1961), *cert. denied,* 368 U.S. 12 (1961); *I.L.F.Y. Co.* v. *State Housing Rent Commission,* 10 N Y 2d 263, 269 (1961), *appeal dismissed,* 369 U.S. 795 (1962).

That the anonymous literature disseminated by the appellant in the earlier case of *People* v. *Zwickler,* 16 NY 2d 1069 (1965), *supra,* involved only a small segment of the

population of Brooklyn, New York, is no less reason to afford him any greater right to claim that his privilege of free speech is inalienable. Our Nation, which is one large government, is dependent upon the workings of the well-run machinery of many "governments" strategically operating throughout the length and breadth of the United States. Good government, and the assurance of an everlasting democratic form of rule, require that these many "governments," within the one large government, the Nation, be free from confusion and ineffectual operation. Such chaotic consequences can be thwarted by a statute which prevents the possibility of anonymously-presented irresponsible views, with regard to election matters, to be passed off as genuine or worthy, and thereby mislead the voters into conduct which may prove disadvantageous to the body politic.

It is significant, however, that the appellant is seeking to enforce his First Amendment rights to "subsequent election campaigns or in connection with *any* election of party officials, nominations for public office and party position that may occur" at any time. (Amended Complaint, para. "FOURTEENTH"—[R. 3] [emphasis supplied].) The inference is justified that he intends to reach a larger audience. That being so, the danger becomes magnified. That anonymous literature in election matters may be aimed at creating better government does not warrant condoning such anonymity as a necessary concomitant of free expression within the matters encompassed in the disputed statute. What may be a better form of government lies in the realm of conjecture and philosophy, and may be predicated upon a view not popular with the majority. The legislation properly attempts to destroy the maze of in-

decision in the minds of the voters in the face of such anonymous material, as well as to strike back at unfair "hit-and-run" character assassination which may personally offend the target of the writings. It is noteworthy that there is a likelihood that anonymous material, "whether in favor of or against," may have as its principal target the electorate at large, in the quest for delusion—a quest which may have disastrous consequences for the form of government as ours which is designed to secure to each and everyone of us the inalienable rights enshrined in the Bill of Rights.

Further, the appellant is not being deprived from participating in election affairs by the operation of the statute. Rather, it is he, who by his very act of encouraging anonymity, has effectively foreclosed and isolated another, the printer, and other persons responsible for the leaflet, from any true participation in such matters simply because he, as the distributor, has prevented others from debating with the unknown author. This anonymity is as conducive to true participation in election affairs as is the possibility of gregarious behavior to be displayed by Alexandre Dumas' hero, the Count of Monte Cristo, while incarcerated in the Château D'If,* except, of course, that the only real difference is that the present appellant seeks to encourage the *sought-after* anonymity of the person or persons responsible, which he intends to perpetuate by his desire to distribute a similar type of leaflet in the future (R. 5-6) (Amended Complaint, para. "FOURTEENTH"—[R. 3]), for which he had been previously prosecuted (*People* v. *Zwickler*, 16 NY 2d 1069 [1965] *supra*), and which leaflet

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* See Collier's *Encyclopedia*, 1967, Vol. 8, p. 418, col. 2; p. 419, col. 1 (Alexandre Dumas *pere*).

contained, primarily, statements extracted from the Congressional Record, with some comments by the anonymous writer, and very likely not at all actionable as libellous. It is reasonable to contend that the appellant's participation in election affairs would be better enhanced by not assisting and encouraging anonymity, since true participation is predicated upon an exchange of ideas, as well as in argumentative discussion, which anonymity prevents.

Notwithstanding the primary aim of the statute, as aforesaid, to protect the public, a state should also concern itself with the possibility that an individual may be anonymously libelled in election matters. If courts can seek to protect accused persons from anonymous informers, then certainly the same protection ought to be accorded persons who are the unfortunate targets of the mysterious libeller, whose aim it may be to "unseat the public servant or even topple an administration." (See *Garrison* v. *Louisiana,* 379 U.S. 64, 75 [1956] *supra.*)

Appellant's reliance upon *Thomas* v. *Collins,* 323 U.S. 516 (1945), is misplaced. (Brief for Appellant, pp.6, 11-13.) A person who speaks in public and is unidentified is unlike the anonymous person who prints, publishes, or reproduces the material set forth in Section 781-b of the Penal Law of the State of New York, *supra.* The former, by his very presence, lends himself open to inquiry from the listeners and, thus, offers them the opportunity of having his sincerity appraised. His identity, also, is, in a sense, not completely obscured because he is in view, albeit his name is withheld. In the violation of the instant statute, however, the opportunities of appraisal and inquiry are not at all available. It is true that the one who distributes anonymous political and election literature is also physically present,

but he may be a mere truckler, seeking to curry favor with the author, and, perhaps, not even acquainted with the nature of the contents so as to be intelligently questioned about the material. He may also be one possibly duped by the printed material so that in relying upon the value of it, may pass on an unwarranted confidence in it to others, who might not have considered the material worthy were the author's identity disclosed to them. *Thomas, supra,* therefore, does not pose any real danger to the exercise of the elective franchise. Appellant casts little value on the name of the utterer. (Brief for Appellant, p. 13.)* "Truth rests on its own supports for acceptance," advances the appellant (Brief for Appellant, p. 13), but the known originator of the written word is the best key for determining the truth. Truth or falsity is more easily recognized when the public knows the source of the statements. Otherwise, the natural human failing of gullibility found in the untrained comes into play. Inquiry sounds out the merits of the disseminated information when the source is known. It cannot be denied that intelligent selection of political views during elections would assure sounder government. Disturbances in socially and economically-disadvantaged areas have been frequently preceded by unreliable and baseless anonymous communications. It would not be unreasonable to say that many persons in our society are inclined to accept statements in a non-discriminatory fashion and without too much analysis, a danger which would be greater when information on election matters is permitted to reach

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* Any contention that the statute requires *a* name and that "a false name creates as much of a nuisance of (*sic*) attempted detection as does the complete absence of a name" (Brief for Appellant, p. 16), is meaningless. The statute obviously refers to true names and addresses, or its aim would be defeated.

the marketplace of ideas from an anonymous source. Disclosure, therefore, becomes a necessity if we are to be assured of fruitful elections. How can the public recognize the truth readily if the person responsible for the statement concerning election matter is cloaked in a veil of secrecy?

The appellant seeks to distribute that type of anonymous political literature proscribed by the statute without a chance for anyone to challenge the views of the accuser responsible for them so that the public can learn the truth and be enabled to cast its votes for a proper candidate. If an accuser is cloaked in darkness, there can be no one to challenge, and if there is no challenge there will be no way for the public to learn the actual facts, and where the truth rests. It is evident that such a state of affairs must surely result in a lack of confidence in, and a disenchantment with, the candidate, as well as government activities, should the person written about disparagingly chance to be elected. On the other hand, should the anonymous writings covered by the statute presently under review unduly "'puff'' the merits of a candidate, the electorate may easily be deluded, with the same possible bad effect. These arguments, it is respectfully submitted, are equally applicable to "any handbill . . . which contains any statement, . . ., concerning any political party, . . . committee, . . ., proposition or amendment to the state constitution, whether in favor of or against . . ., in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution . . . ", all within the ambit of Section 781-b of the Penal Law, *supra*. Nor are such arguments weakened because one may be able to independently check out the truth or falsity of the *anonymous* statement. It is

hardly likely that the average citizen would attempt to do such investigating on the eve of the election. Then again, it would not be unrealistic or uncharitable to contend that gullibility, previously alluded to, which results in the attendant reliance upon unchecked-out statements, is, rather, a deterrent to investigation. The anonymous statement which suddenly appears on the night of the election is more apt to be "swallowed" because of its sudden impact at a time when it is most difficult to undertake verification, if the latter be actually desired. To rely solely upon sanctions against fraud and "palming-off" (Brief for Appellant, p. 16), may not only fail to prevent the bad effect upon the electorate, but may prove futile in the face of such conduct behind the cloak of anonymity. To permit the anonymous acts now proscribed by the instant statute would give no practical meaning to any suggested sanctions because there would be no person to punish. However, to apply significance to the statute, as intended, and thereby uphold it, would, in an important measure, discourage such fraud and "palming-off." Thus, disclosure is more apt to dispirit delusion of any part of the public in election matters. In a narrower sense, if the anonymously-conceived material is libellous in nature, the person injured ought not to be faced with the additional burden of "hunting" for the wrongdoer, for even if he were able to vindidate himself, a scar must necessarily remain as a haunting memory unless he is able to bring the libeller to task. "Defamation . . . does not only serve to build and unify an anti-democratic group. It is likely to weaken those who are attacked." (See Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 Col. L. Rev. 1085, 1089 [1942]; see also,

Noel, *Defamation of Public Officers and Candidates,* 49 Col. L. Rev. 875 [1949].)*

Any reference to the Federalist papers of Hamilton, Jay and Madison would not be in point. These writings which make up classic commentaries on American constitutional law and on principles of Government generally were written between October, 1787 and April, 1788, and appeared in the New York *Independent Journal.* The writings advocated centralization of our Government, and were in defense of the newly-conceived Federal Constitution. It is significant that none of these writings were vitriolic or slanderous, nor were they intended as *ad hominem* attacks. They were learned treatises which were designed to be constructive in purpose and to expound the theory that a strong centralized form of government was best suited for the infant Nation.

Since there would have been no danger of criminal or civil proceedings against the writers of these famous papers for personal invective, anonymity with regard to these writings was not really necessary, and were undertaken in such manner for another reason, probably to avoid any attacks on life or limb. Of course, the desire of Hamilton, Jay and Madison to promulgate the ideas contained in the *Federalist* papers without prejudgment and unfair criticism by their opponents, had their names been prematurely disclosed as the writers, could, no doubt, have also motivated the anonymity. Then again, writing anonymously during that period was "according to the fashion of the times" (Collier's *Encyclopedia,* 1967, Vol. 11, p. 609, col. 1).

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* To appreciate the effect of libel and unfair criticism, whether open or furtive, upon one of our greatest Americans, Thomas Jefferson, see Collier's *Encyclopedia,* 1967, Vol. 13, p. 530, cols. 1, 2.

In the instant case, however, the appellant has not disclosed the need for distributing anonymous leaflets, the contents of which, it is reiterated, do not even appear to be actionable as libellous.

In addition, we are not now directly concerned with the printer of the material, and any consideration of the historic case of Peter Zenger* and the right of a free press,** since we are not faced with a factual situation involving a defendant charged with printing anonymous political literature, per se. The appellant is one whose wish it is to knowingly distribute anonymous election material (Amended Complaint, para. "FOURTEENTH"—[R. 3]), and it is this distribution, the most danegrous link in the chain of possible harmful reaction on the electorate, with which we are most concerned. Without the distribution, the printing is inconsequential and meaningless since it can have no effect on a public that does not come in contact with it. It is certain that the printer of the material set forth in the statute clearly assumes the garb of culpability the moment he places such material in the hands of the distributor without complying with the requirements of the law.

Even though it is apparent that the purpose of the statute is to safeguard a proper state interest, the protection of its

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* See Collier's *Encyclopedia*, 1967, Vol. 23, p. 752, cols. 1, 2.

** Freedom of the press is not an absolute right. See *Giragi* v. *United States*, 301 U.S. 670, wherein the appeal was dismissed for want of a substantial Federal question. In *Giragi*, 48 Ariz. 33, 58 P. 2d 1249, 64 P. 2d 819, the Superior Court of Maricopa County, Arizona, held that the imposition for revenue of an annual privilege tax on various kinds of business which, in the case of newspapers, is an amount equal to one percent of the gross proceeds received from their publication, is not violative of the due process clause of the Fourteenth Amendment as an abridgement of freedom of the press.

voters from the influences of possible false and misleading information in election and political matters, *secretly-conveyed,* there is no intention, whatever, to censor the language or idea itself, or even to compel silence, since the writer is free to impart such written communications provided he discloses his identity, and the material does not otherwise offend the law (see, e.g., *New York Times* v. *Sullivan,* 376 U.S. 254 [1964], *supra; Garrison* v. *Louisiana,* 379 U.S. 64 [1964], *supra*). Thus, there is also "open and available" to the appellant a channel of communication other than by the anonymity he seeks to participate in, and by which he can express himself.

See *Kovacs* v. *Cooper,* 336 U.S. 77, 89 (1949); compare, *Bakery Drivers Local* v. *Wohl,* 315 U.S. 769, 775 (1942); see also, *People* v. *Street,* 19 N Y 2d 231, 235 (1967).

Since careful analysis of the leaflet referred to herein (R. 5-6) fails to reveal its quality as literary property so as to bring the act of plagiarism into consideration, and since its contents do not appear to be actionable at law as libellous (the latter view being shared by appellant's counsel [Brief for Appellant, pp. 17-18]; *New York Times* v. *Sullivan, supra, Garrison* v. *Louisiana, supra* and *Time, Inc.* v. *Hill,* 385 U.S. 374 [1966]), the appellant has the alternative of complying with the instant statute in the manner set forth therein, even to the extent of assuming the authorship of a similar view. In the light of the foregoing, can it not be reasonably said that if the appellant has been "chilled in the exercise of his rights,"* it is he who must shoulder the blame for that since he could have pursued a more acceptable channel of communicating his opinions, and without *in terrorem* considerations.

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*. See Brief for Appellant, p. 22.

The cases relied upon by the appellant are inapposite since the persons affected therein were faced with the serious impugnment of their constitutional rights, and, unlike the appellant herein, were not afforded any alternative by which their basic rights could substantially be exercised. Thus, in *Baggett* v. *Bullitt*, 377 U.S. 360 (1964) *supra*, which involved the taking of oaths by teachers, said oaths designed to combat subversive conduct, Mr. Justice White stated as follows:

> "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law. Nor should we encourage the casual taking of oaths by *upholding the discharge or exclusion from public employment* of those with a conscientious and scrupulous regard for such undertakings [engaging in criticism in its broadest sense and on varied subjects]" (*Id.* at 373-4; emphasis supplied.)

The appellants, approximately 64 in number, in *Baggett, supra*, were not in a position to determine the nature of the oaths the two statutes of the State of Washington were intended to encompass, and as Mr. Justice White aptly queried, "[I]f the oaths do not reach some or any of the behavior suggested, what specific conduct do the oaths cover? Where does fanciful possibility end and intended coverage begin?" (*Id.* at 373.) Thus, the appellants were faced with the serious danger of successful perjury prosecution by the mere signing of a vague oath. "The hazard of being prosecuted for knowing but guiltless behavior . . . remains." (*Id.* at 373.)

Likewise, in *Keyishian* v. *Board of Regents, supra*, 385 U.S. 589 (1967), a requirement that teachers sign certifi-

cates intended to prevent the appointment or retention of subversive persons in state employment was also struck down for substantially the same reasons as in *Baggett, supra,* with Mr. Justice Brennan noting the existence of a "highly efficient *in terrorem* mechanism" (385 U.S., *supra,* at 601), and adding:

> "When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone . . .' *Spieser* v. *Randall,* 357 U.S. 513, 526." (385 U.S., *supra,* at 604.)

Significantly, Mr. Justice Brennan, in evaluating the danger inherent in the requirements faced by the teachers in *Keyishian, supra,* relied upon the language pronounced in *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957), that:

> "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." (385 U.S., *supra,* at 603.)

In *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), relied upon by the appellant (Brief of Appellant, p. 9), the factual situation depicted cast upon the recipient of mailed material an onus and taint which he could not possibly avoid except by total surrender of the opportunity to absorb all ideas that could be gleaned from the receipt of mailed material, even though that material might contain matter which the addressee would probably never adopt as a guide to thought and behavior, because of its possible subversiveness. In short, the right to learn by reading was in danger

of impairment. As Mr. Justice Douglas stated in the majority opinion in *Lamont, supra*:

> "We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. *Their livelihood may be dependent on a security clearance. Public officials, like schoolteachers who have no tenure,* might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.' The regime of this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270." (*Id.* at 307; emphasis supplied.)

The appellant herein is in no wise faced with such a "highly efficient *in terrorem* mechanism" (*Keyishian* v. *Board of Regents,* 385 U.S. 589, 601 [1967], *supra*), and has other means of imparting the information contained in the leaflet, which we reiterate, does not even appear to be actionable at law, criminally or civilly, as libellous matter (R. 5-6), without reason to fear complying with the requirements of Section 781-b of the Penal Law of the State of New York, *supra.* In any event, the public interest in good government and proper elections requires the neces-

sity of such a statute. Again, there was no showing in *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), *supra,* that the *only* persons receiving the subversive mail were themselves subversive, which may very well have dictated a "public interest" approach.

Likewise, the other cases cited by the appellant which purport to cast some favorable light upon the claim that he is being unreasonably deprived of a constitutional right, are equally inapplicable. Therefore, it would serve no useful purpose to offer any analysis of them.

In recent years, courts have outlawed particular modes of expressing ideas, which ideas would probably not have been interfered with had they been disseminated in a more acceptable fashion. (See *Kovacs* v. *Cooper,* 336 U.S. 77 [1949], *supra* [sound truck];* *Adderley* v. *Florida,* 385 U.S. 39 [1966], *supra* [trespass]; *United States* v. *Miller,* 367 F. 2d 72 [2d Cir. 1966], *cert. denied,* 386 U.S. 911 [1967], *supra* [destruction of draft card]; compare, *O'Brien* v. *United States,* 376 F. 2d 538 [1st Cir. 1967], *supra*; *People* v. *Stover,* 12 NY 2d 462 [1963], *appeal dismissed,* 375 U.S. 42 [1963] [symbolic expression "offending sensibilities"]; *People* v. *Martin,* 15 NY 2d 933 [1965], *cert. denied,* 382 U.S. 828 [1965] [sit-in]; *People* v. *Penn,* 16 NY 2d 581 [1965], *cert. denied,* 383 U.S. 969 [1966] [picketing]; *People* v. *Street,* 19 NY 2d 231 [1967], *supra* [flag-desecration by burning].)

In conclusion, it must be stated that it is incredible that any advocate of freedom of expression should contend that

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* In *Kovacs, supra,* the cherished principle of freedom of speech was required to yield to the "comfort and convenience" of the citizenry.

the present statute is unconstitutional because it demands disclosure, for is not anonymity predicated on the very absence of such freedom! It is only in a free world, as distinguished from a totalitarian one, that the individual is free to speak and write his thoughts without the need of unavowed authorship. Anonymity is more often the handmaiden of fear since it reveals "shackled" expression which, in the instant case, the appellant now seeks to perpetuate by his claim that he has an inalienable right to circulate anonymous election material in violation of a sound and salutary enactment. In doing this, he seeks to assist the writer of the leaflet (R. 5-6), who is bent on avoiding responsibility, to influence the electorate into acting in a manner which could very well have a debilitating effect upon the elective franchise, with consequent dire results upon society. We are faced with such a danger if we permit the Constitution to be utilized as a convenient vehicle with which to inundate the public with anonymous political and election literature, deceptive or excoriating in nature, within the prohibition of the instant statute. Vital, indeed, is the sentiment voiced many years ago by Felix Frankfurter (then Professor Frankfurter) and Thomas G. Corcoran, when they wrote:

> ". . . American social policy suffers all too much from the dictation of abstract questions of constitutional power. . . ." (See Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 982 [1926].)

CONCLUSION

In view of the above, therefore, it is the respectful submission of *Amicus Curiae* that the order dismissing the amended complaint be affirmed in all respects.

Dated: Brooklyn, New York
September 26, 1967

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~810~~ 29

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL TO THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL TO THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

Appellant appeals from an order of the United States District Court for the Eastern District of New York, entered on September 29, 1966, which denied an interlocutory injunction to appellant and also dismissed the complaint, and submits this Statement to show this court that it has jurisdiction on the appeal and that a substantial question is involved.

Opinions Below

The District Court wrote three opinions, one by Judge Zavatt, for the court, a concurring opinion by Judge Kaufman and a dissenting opinion by Judge Rosling, which are appended hereto as Appendix B. They are not yet reported.

Jurisdiction

(i) This case arises from an order of a three-judge court, entered in the United States District Court for the Eastern District of New York, which denied by a vote of 2-1 the application of the appellant for an injunction, and granted appellee's motion to dismiss the amended complaint.

(ii) The order was made and entered in the said District Court on September 29, 1966, Appendix A, *post.*

The Notice of Appeal was filed on October 28, 1966 in the said District Court.

(iii) The jurisdiction of this court is conferred by 28 U.S.C., Section 1253.

Statute Involved

The statute involved in Section 781-b of the Penal Law of New York (McKinney's Consolidated Laws of New York, volume 39).

Section 781-b:

> "No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or

amendment to the state consitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also so printing, publishing or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

"The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal." L. 1941 ch. 198.

Section 782 provides as follows:

"Any person convicted of a misdemeanor under this article shall for a first offense be punished by imprisonment for not more than one year, or by a fine of not less than one hundred dollars nor more than five hundred dollars, or by both such fine and imprisonment. Any person convicted of a misdemeanor under this article for a second or subsequent offense shall be guilty of a felony."

Questions Presented

1. Is Section 781-b of the Penal Law of the State of New York repugnant to the Constitution of the United States in that it is a restraint on freedom of expression?

2. Should the District Court have abstained from deciding the constitutional question squarely involved under the Constitution of the United States?

3. Should the District Court have dismissed the amended complaint without rendering judgment on the merits of appellant's constitutional claims?

Statement

The appellant commenced this action for a declaratory judgment and injunction in the United States District Court for the Southern District of New York. The appellant alleged that he had been previously convicted for a violation of Section 781-b in that he had distributed an anonymous leaflet commenting upon a candidate for the Congress of the United States. Upon his appeal, his conviction was reversed because of the insufficiency of the evidence. Thereafter, the appellee as district attorney pursued the case to the Court of Appeals, the highest court in New York, which affirmed the reversal of the conviction, without opinion, *People* v. *Zwickler*, 16 N. Y. 2d 1069. The appellant, however, in expectation of a renewal of the candidacy of that person wishes to renew the distribution by him of the anonymous leaflet. But he was mindful of his previous conviction and his involvement in a prior prosecution all the way to the Court of Appeals. He was also mindful that the statute is such that a second conviction under it is a felony, with all its attendant disabilities in New York. He therefore fears to make distribution. He will not risk another prosecution and has thus been pre-

vented from making distribution. His interest in expressing himself is thus chilled by the perils and difficulties associated with such expression.

Moreover, the statute is overbroad and vague in that its scope extends to anonymous political literature which is truthful and in good faith. It also extends to literature relating to ideas, such as constitutional amendments, as distinct from comment upon personalities.

He also alleged that the appellee is a diligent prosecutor who had previously pursued him to the Court of Appeals and intends to again prosecute him and that because of the threats of prosecution of him, the appellant fears to exercise his right of expression by the distribution of the anonymous leaflet. Appellant alleges that he desires to distribute the leaflet in large quantities during the 1966 and subsequent election campaigns or in connection with the election of party officials, nominations for public office and party position that may occur *after* 1966.

He therefore prayed that the court declare Section 781-b to be repugnant to the Constitution of the United States and to enjoin its enforcement.

The appellant moved for an interlocutory injunction and for the convening of a three-judge statutory court. The appellee moved to dismiss the complaint on the ground that it did not state a claim upon which relief could be granted.

The motion to convene a three-judge court was granted. It was convened and a hearing was held. That court by a vote of 2-1 denied injunctive relief to the appellant and granted appellee's motion to dismiss the amended complaint.

It should be added that at the hearing counsel stipulated that since the facts were not in dispute, the court should treat the hearing as one for final judgment (Minutes, Record pp. 77-78). Indeed, the substantial facts are matters of public record (*People* v. *Zwickler,* 16 N. Y. 2d 1069).

The majority held that although it had jurisdiction, it should nevertheless abstain from granting the relief. Judge Rosling in a dissenting opinion held that since it was clear that the statute was unconstitutional as an infringement of appellant's freedom of expression the decisions of this court commanded that relief should be afforded to appellant.

The Questions Are Substantial

The order below should be reviewed because a federal question of substance, not heretofore decided by this court is involved. This court has never passed upon the question whether a state may proscribe the distribution of anonymous literature relating to candidates for public office and to the political structure of a state.

The order below should be reviewed because in abstaining from affording any relief to the appellant, the District Court abused its discretion contrary to the decisions of this court in protecting the exercise of First Amendment rights of appellant, free from the inhibiting effect of the statute.

It will be observed that the statute is directed against anonymous material when disseminated in connection with:

(1) any election of public officers

(2) party officials

(3) candidates for nomination for public office

(4) party position

(5) proposition or amendment to the state constitution;

concerning the following:

(a) a political party

(b) candidates

(c) committee

(d) person

(e) proposition to the state constitution

(f) amendment to the state constitution.

The substantiality of the questions presented is summarized in Judge Rosling's dissenting opinion (*post,* p. 30). He held that the statute on its face, is repugnant to the Constitution. The District Court therefore should afford relief, and not subject Zwickler to martyrdom in order to learn his rights. Since the statute by its terms would deter Zwickler from exercising his constitutional right, as he alleges, relief should be afforded to him.

The statute, held Judge Rosling, is an invalid restraint of speech under *Talley* v. *California,* 362 U. S. 60. It is also overbroad: it did not restrict itself to false or erroneous anonymous statements. Under *New York Times* v. *Sullivan,* 376 U. S. 254 and *Mills* v. *Alabama,* 384 U. S. 214, false comments upon public officials, even if made on the eve of an election, demonstrate that a construction of the statute that would embrace false statements—a construction which the Attorney General argued was implicit in the statute—would still render the statute invalid.

The District Court abused its discretion. Since the statute is invalid, there is no valid reason for withholding the exercise of jurisdiction. As Judge Rosling held: Under *Baggett* v. *Bullitt,* 377 U. S. 360, abstention for the purpose of enabling an overbroad statute to be rendered certain by state construction or enactment is inappropriate, for in the meantime the vice of the statute inhibits the exercise of First Amendment freedoms. It was this chilling effect upon the exercise of those freedoms by an unconstitutional statute which prompted this court in *Dombrowski* v. *Pfister,* 380 U. S. 479, to require the exercise of federal jurisdiction. And Judge Rosling points out, *Dombrowski*

did not rest on what appears to the majority to be its salient feature—a threat of violence. *Baggett,* which it followed, was not a case of violence at all, but one of inhibiting the exercise of the freedom of expression. In other words, given a clear case of unconstitutionality of a statute which inhibits expression, it is not only appropriate, but obligatory for a court to afford relief.

The abuse of discretion is apparent. The majority was cognizant that *Baggett* commands that a court should not abstain unless there are special circumstances. Yet the court found no special circumstances against exercising jurisdiction. On the contrary, the special circumstances are marked *in favor* of retention of jurisdiction for the statute is clearly unconstitutional and prevents expression as the court recognized in assuming jurisdiction over what it found is a genuine case and controversy (*post,* 16).

The special circumstances the court found were that since New York has a declaratory judgment procedure, recourse to the federal courts should be barred (*post,* 25). We submit, however, that it was not the intention of Congress that the existence of such a remedy in a state foreclosed relief in the federal courts. The contrary is true: it was the intent of Congress that an expeditious and efficient remedy in the federal courts should prevail in cases involving civil liberties, especially when a challenge is made that a state statute is repugnant to the Constitution in that it impairs First Amendment rights.

It should be added that should Zwickler be relegated to the state court for relief by way of an action for a declaratory judgment, as suggested by the majority (in order to escape the perils of martyrdom), he would be in the same posture as in a District Court. Under New York law, the remedy of declaratory judgment is a discretionary one (*Delaware Lackawanna Railroad Co.* v. *Slocum,* 299 N. Y. 496, 505, holding that the remedy is discretionary and the

New York Court of Appeals will not review the exercise of discretion; also, *Newburger* v. *Lubell*, 257 N. Y. 383, *Bareham* v. *Rochester*, 246 N. Y. 140). The exercise of equitable jurisdiction by a District Court is likewise discretionary.

Although asserting jurisdiction (*post*, 17) the District Court abstained from exercising it, not in the sense of postponing its exercise, but by dismissal of the complaint on the merits. It thus barred all remedy to appellant.

Short of exposing himself to the perils of the prosecution to which he had already been subjected, Zwickler therefore cannot be assured of redress. Since he asserts he is unwilling to take the risk, he is effectually barred from exercising his First Amendment rights.

The majority opinion placed emphasis upon *Douglas* v. *Jeanette*, 319 U. S. 157. We submit, however, that *Dombrowski*, following *Baggett*, made plain that when First Amendment rights are inhibited by a statute invalid on its face, it was obligatory for a District Court to exercise jurisdiction. In this connection it is not amiss to point out the special circumstances of the *Douglas* case. Since that case was one for an injunction it was controlled by equitable principles, one of which is that equity does not decree what is useless. In that case, on the very day the case was decided, the ordinance which was attacked as invalid, was held unconstitutional in *Murdock* v. *Pennsylvania*, 319 U. S. 1050. This court concluded it would be unnecessary under those circumstances to exercise equitable jurisdiction.

Douglas could therefore have relied upon this court's holding in *Murdock* that the ordinance was unconstitutional. But that is not this case. Here, Zwickler fears to exercise his rights because the statute stands against him. Contrary to *Douglas*, the statute has been sustained against him at his trial in the state court.

All of the foregoing is augmented by the decisions in *Evers* v. *Dwyer,* 358 U. S. 202; *Cameron* v. *Johnson,* —— U. S. ——, 14 L. ed. 2d 715; *Carr* v. *Baker,* 369 U. S. 186; *Reed Enterprises, Inc.* v. *Corcoran* (C.A.D.C.), 354 F. 2d 519; *Interstate Circuit, Inc.* v. *City of Dallas* (C.C.A. Fifth), August 30, 1966, No. 23306, not reported; *NAACP* v. *Button,* 371 U. S. 415; *Shelton* v. *Tucker,* 364 U. S. 479.

And of course, this is not a case such as *Stefanelli* v. *Minard,* 342 U. S. 117, and *Pugach* v. *Dollinger,* 365 U. S. 458, where a prosecution was already pending in a state court, and injunction against its proceedings was sought.

Conclusion

This court in *Freedman* v. *Maryland,* 380 U. S. 51, revealed its impatience with statutes that *delay* and thus inhibit the exercise of First Amendment rights. It is evident that delay in the exercise of those freedoms is often their destruction. In stating this we are reminded of *Ellis* v. *Dixon,* 349 U. S. 458, where the delay through state litigation to this court and back again through state courts, although pursued with great diligence extended over many years. Ellis, who sought to have a meeting about the Korean war, found to his dismay, that the subject of the speech had passed into history.

Although the delays and frustrations in pursuing First Amendment freedoms are fraught with exacerbations, as Justice Reed pointed out in *Poulos* v. *New Hampshire,* 345 U. S. 395, nevertheless such a condition need not be accepted fatalistically. *Freedman* has demonstrated that delay may be eliminated, and that means may be devised wherever possible toward that end.

Were Zwickler restricted to learn his constitutional rights only after he risked prosecution in the state courts, the criminal trial, intermediate appeal and appeal to the

state's highest court, if allowed, would surely delay the exercise of his right and defeat the intent of this court to preserve the right.

Dated: New York, New York, November 16, 1966.

Respectfully submitted,

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Appendix A.

ORDER

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket # 66 Civ. 375

SANFORD ZWICKLER,

Plaintiff,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Defendant.

The plaintiff, having moved for a preliminary injunction in favor of plaintiff to enjoin enforcement of Section 781-b of the Penal Law of the State of New York on the ground the said law is unconstitutional, and for the convening of a statutory three-judge court to hear said application, and the defendant having moved for an order dismissing the complaint, and the motion for the convening of a statutory three-judge court having been granted by the Hon. George Rosling, United States District Judge, and the said court consisting of the Hon. Irving Kaufman, Circuit Judge of the Second Circuit, the Hon. Joseph C. Zavatt, Chief Judge of the United States District Court for the Eastern District of New York and the Hon. George Rosling, United States District Judge for the Eastern District of New York, having been convened on June 9, 1966 and the said application having been heard on said

date and the said court having filed its opinion on September 19, 1966 in favor of the defendant, Judge Rosling dissenting, it is

ORDERED, that the motion of the plaintiff for a preliminary injunction be and the same is hereby denied; and it is further

ORDERED, that the motion of the defendant to dismiss the complaint be and the same hereby is granted.

Dated: the 29th day of September, 1966.

IRVING R. KAUFMAN,
United States Circuit Judge.

JOSEPH C. ZAVATT,
United States District Judge.

.....,
United States District Judge.

Appendix B.

(Opinions)

Zavatt, Chief Judge:

On the motion of the plaintiff, a three-judge court was convened, pursuant to 28 U.S.C. § 2284. The plaintiff seeks an order enjoining the defendant from prosecuting him under section 781-b[1] of the New York Penal Law, which the plaintiff contends is violative of the First Amendment as made applicable to the states through the Fourteenth Amendment. The defendant has made a cross-motion to dismiss the amended complaint upon the grounds (1) that this court lacks subject-matter jurisdiction and (2) that the amended complaint fails to state a claim upon which this court can grant relief. For the reasons hereinafter stated, the plaintiff's motion is denied; the defendant's motion is granted.

The New York statute under attack prohibits, among other things, and renders criminal the distribution of anonymous political literature "in quantity." A first offense under the statute is punishable as a misdemeanor; subsequent offenses, however, constitute felonies. At the present time the plaintiff is not distributing anonymously any such political literature nor is he being prosecuted for any such distribution made by him prior to the institution of this action. He grounds his amended complaint and his motion for an injunction primarily upon what happened to him during the 1964 political campaign and his apprehension as to what may transpire during 1966 and subsequent political campaigns.

During the 1964 political campaign, the plaintiff distributed an anonymous leaflet[2] critical of a named candidate for reelection to the House of Representatives. He was charged with a violation of section 781-b of the New York Penal Law and found guilty after a trial (at which he

presented no evidence) by the Criminal Court of the City of New York, County of Kings, despite his contention that section 781-b violates the Fourteenth Amendment. *People* v. *Zwickler* (Crim. Ct., N. Y. City, Kings Co., Feb. 10, 1965, unreported). The judgment of conviction was "unanimously reversed on the facts." *People* v. *Zwickler* (Sup. Ct., App. T., Kings Co., April 23, 1965, unreported):

> "In our opinion, the People failed to establish that defendant distributed anonymous literature 'in quantity' in violation of the provisions of Section 781(b) [sic] of the Penal Law. We do not reach the question of the constitutionality of the statute involved."

The New York Court of Appeals affirmed without opinion the reversal of the judgment of conviction. *People* v. *Zwickler*, 16 N. Y. 2d 1069, 266 N.Y.S. 2d 140 (1965).

Prior to September 1, 1962, section 781-b applied only to the anonymous printing and reproduction (not the distribution) "in quantity" of political literature in connection with any election of public officers or of candidates for nomination for public office. It did not apply to such literature in connection with any election of party officials or candidates for nomination for a party position. It was not until September 1, 1962 that this section was expanded to apply to *distribution* of such literature "in quantity." L. 1962, c. 576, eff. September 1, 1962. Prior to this 1962 amendment, one Robert Clampitt distributed anonymous handbills in connection with a primary election for the selection of a district leader of the Democratic Party. He was running in that primary in opposition to the incumbent, who was seeking redesignation. Clampitt was charged with a violation of section 781-b. At the close of the People's case, Clampitt's motion to dismiss the information was granted and he was discharged. *People*

v. *Clampitt*, 34 Misc. 2d 766, 222 N.Y.S. 2d 23 (Ct. Spec. Sess. N. Y. Co. 1961). The court held that (1) section 781-b did not apply to anonymous literature in connection with an election of candidates for party office, (2) that it did not apply to the distribution of anonymous political literature and (3) that, even as to those instances to which it did apply, it was "void for indefiniteness and uncertainty." "Just what is meant by 'in quantity' is not defined. How much or how little is 'in quantity'?" "The public should not be compelled to indulge in guessing games where violations of criminal law are concerned." *Clampitt, supra*, 34 Misc. 2d at 768, 222 N.Y.S. 2d at 25-26. The "in quantity" aspect of the validity of the section was not passed upon by the New York Court of Appeals in *Zwickler, supra.* Nor did that court consider the constitutionality of section 781-b under the Fourteenth Amendment to the Constitution of the United States or under Article 1, section 8 of the Constitution of the State of New York.[3]

In his amended complaint, the plaintiff alleges his intention and desire to distribute in the future and "in quantities of more than a thousand copies" the anonymous leaflet he distributed in 1964[4] "and similar anonymous leaflets, all prepared by and at the instance of a person other than the plaintiff"; to do so "at any time during the election campaign of 1966 and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966." The plaintiff does not accuse Aaron E. Koota, the District Attorney of Kings County, New York, of bad faith. Rather, he praises him as a "diligent and conscientious public officer" and presumes to read Mr. Koota's mind by alleging that Mr. Koota "pursuant to his duties intends or will again prosecute the plaintiff for his [intended] acts of distribution" of anonymous political literature. He

regards this presumption as "the threat of prosecution" which places him "in fear of exercising his right to make distribution as aforesaid" and which places him "in danger of again being prosecuted therefor." Upon these assumptions he grounds his prayers for relief for (1) a declaration that section 781-b is unconstitutional as violative of the First and Fourteenth Amendments; (2) an injunction restraining the defendant from prosecuting him for his intended distributions of political literature and (3) an injunction pendente lite. From a reading of the amended complaint, it would appear that it has been drafted in the hope of bringing this case within *Dombrowski* v. *Pfister*, 380 U. S. 479, 85 S. Ct. 116 (1965). And, as a matter of fact, the memorandum of law of plaintiff's counsel leans heavily upon that opinion.

The threshold question is whether or not this court should temper the exercise of its equitable power to enjoin the defendant. As far back as *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441 (1908), the Supreme Court recognized the power of a federal court to enjoin a threatened prosecution by a state official under a state statute in a case reasonably free from doubt. "[N]o injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the Federal courts." 209 U. S. at 166-67, 28 S. Ct. at 457. Since *Young, supra*, "considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good faith administration of its criminal laws is peculiarly inconsistent with our federal framework." *Dombrowski, supra*, 380 U. S. at 484, 85 S. Ct. at 1119-20. The complaint states a claim under the Civil Rights Act, 28 U.S.C. §1343(4), since it alleges a deprivation of a right guaranteed by the Fourteenth Amendment. It alleges a case or controversy which is

within the adjudicatory power of this court. *Douglas* v. *City of Jeannette,* 319 U. S. 157, 162, 63 S. Ct. 877, 880 (1943). This is not to say, however, that this court necessarily agrees with the plaintiff's contention that "freedom of expression" includes freedom to express one's views by criticizing a named public officer or a named candidate for public office, under the cloak of anonymity. This question was not involved in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 84 S. Ct. 710 (1964). See *Bertelsman, Libel and Public Men,* 52 A.B.A.J. 657 (July 1966).

The fact that a case is within the adjudicatory power of this court does not necessarily require that its power be exercised. As a general rule and policy a district court, on its own motion, may, in its discretion, refuse to act. "Especially should it do so where its powers are invoked to interfere by injunction with threatened criminal prosecutions in in a state court." *Douglas, supra,* 319 U. S. at 162, 63 S. Ct. at 880. In *Douglas,* the plaintiffs, Jehovah's Witnesses, brought suit in a district court to restrain threatened criminal prosecution in a state court for violation of a city ordinance which prohibited the solicitation of orders for merchandise without first procuring a city license, claiming that the city ordinance violated the Fourteenth Amendment. The trial court found that certain of the plaintiffs and other Jehovah's Witnesses had been prosecuted previously by the defendants for distributing literature without having first obtained a license and having paid a tax therefor; that the defendants had declared their intention further to enforce the ordinance against the plaintiffs. But the trial court made no findings of threatened irreparable injury to the plaintiffs. As to this, the Supreme Court said: "we cannot say that the declared intention to institute other prosecutions is sufficient to establish irreparable injury in the circumstances of this case." *Douglas, supra,* 319 U. S. at 164, 63 S. Ct. at 881. On the

same day the Court rendered its opinion in *Murdock* v. *Commonwealth of Pennsylvania,* 319 U. S. 105, 63 S. Ct. 870, involving the same city ordinance under which Jehovah's Witnesses were prosecuted for distributing religious literature and soliciting the purchase of religious books and pamphlets. *Murdock* presented a single issue "The constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities." *Murdock, supra,* 319 U. S. at 110, 63 S. Ct. at 873. The convictions of the defendants in the state court were reversed on the ground that the ordinance imposed a tax upon the constitutional rights of the free exercise of religion, freedom of speech and freedom of the press. And because the Court held invalid in *Murdock* the same city ordinance under review in *Douglas,* it affirmed in *Douglas* the reversal by the Court of Appeals of the judgment for the plaintiff in the district court. Since an injunction looks to the future and "in view of the decision rendered today in *Murdock, et al.* v. *Pennsylvania, supra,* we find no ground for supposing that the intervention of a federal court, in order to secure petitioner's constitutional rights, will be either necessary or appropriate." *Douglas, supra,* 319 U. S. at 165, 63 S. Ct. at 882. The Court said that "courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution *in good faith* for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for injunction. . . . Where the threatened prosecution is by state officers for alleged violation of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court

on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported *only on a showing of danger of irreparable injury 'both great and immediate.'* " *Douglas, supra,* 319 U. S. at 163-164, 63 S. Ct. at 881. (Emphasis added.)

It may be argued that the principle of abstention illustrated by *Douglas, supra,* is inapposite because, on the very day *Douglas* was decided, the Supreme Court had held the statute involved therein to be unconstitutional in *Murdock, supra.* However, subsequent cases demonstrate that the doctrine of judicial abstention remains fully viable. In *Harrison* v. *N.A.A.C.P.,* 360 U. S. 167, 79 S. Ct. 1025 (1959), decided several years after *Douglas* and involving Fourteenth Amendment rights, a three-judge statutory court permanently enjoined the Attorney General of Virginia and other officials from enforcing certain statutes of the Commonwealth of Virigina which imposed conditions upon the right to make public solicitation of funds and to expend such funds for litigation involving racial segregation. *N.A.A.C.P.* v. *Patty,* 159 F. Supp. 503 (E. D. Va. 1958).

The state statutes involved had not been authoritatively construed by the courts of Virigina. Nevertheless the three-judge court felt that it should not abstain; that it should pass upon the constitutionality of these statutes because it considered them free from ambiguity and that there was no reasonable interpretation which would render them constitutional. It held certain chapters of the law to be unconstitutional and permanently enjoined their enforcement. As to two chapters the court did not pass upon their constitutionality. Rather, it retained jurisdiction and allowed the complaining parties a reasonable time

within which to obtain a state interpretation. On appeal, the Supreme Court vacated the judgment and remanded the case with instructions so as to afford the Virginia courts a reasonable opportunity to construe the statutes, believing as it did, that they were fairly open to interpretation and that the state courts should have been afforded a reasonable opportunity to pass upon them. The Supreme Court did not agree that the statutes left no reasonable room for a construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutional adjudication or at least materially change the nature of the problem. It referred to the well-established principle of abstention:

> "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. . . . In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. . . . This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication.
>
> . . . . . .
>
> We do not intimate the slightest view as to what effect any such determinations might have upon the validity of these statutes. All we hold is that these

> enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court. . . . And of course we shall not assume that the Virginian courts will not do their full duty in judging these statutes in light of state and federal constitutional requirements." 360 U. S. 176-78, 79 S. Ct. 1030-31.

The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law. It involves a discretionary exercise of a court's equity powers. In *Baggett* v. *Bullitt*, 377 U. S. 360, 84 S. Ct. 1316 (1964), the Supreme Court reversed a three-judge United States District Court which abstained and refused to pass upon the constitutionality of a state statute. Whether the court should have abstaind, said the Supreme Court, depended upon "whether there exist 'special circumstances' prerequisite to its application. . . ." It found that such "special circumstances" were not present and, therefore, that the three-judge court should not have abstained from passing upon the constitutional question.

In *Dombrowski* v. *Pfister*, 380 U. S. 479, 85 S. Ct. 1116, the Supreme Court reversed a three-judge statutory court which had dismissed the complaint in an action under the Civil Rights Act to restrain the defendants from prosecuting the plaintiffs for alleged violations of the Louisiana Subversive Activities and Communist Control Law and Communist Propaganda Control Law. Here, the Supreme Court looked for special circumstances to justify the exercise of federal court jurisdiction rather than for special circumstances to justify a federal court in abstaining to exercise its jurisdiction:

> "And in a variety of other contexts the Court has found no special circumstances to warrant cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution." 380 U. S. at 485, 85 S. Ct. at 1120.

It found the presence of such special circumstances in *Dombrowski* and, therefore, reversed the judgment of the three-judge court.

The complaint in *Dombrowski,* supported by affidavits and a written offer of proof, alleged that the threats to enforce the statutes were not made with any expectation of securing valid convictions but, rather, were part of a plan to employ arrests, seizures and threats of prosecution under color of the statutes to harass the appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of the citizens of Louisiana. The Supreme Court noted probable jurisdiction in order to resolve a seeming conflict between the decision of the lower court in 227 F. Supp. 556 and the later decision of the Supreme Court in *Baggett* v. *Bullitt, supra,* "and to settle important questions concerning federal injunctions against state criminal prosecutions threatening constitutionally protected expression." 380 U. S. at 483, 85 S. Ct. at 1119. There, the good faith of the enforcement officers was attacked. The appellants claimed that these officers invoked and threatened to continue to invoke criminal process without any hope of ultimate success, but only to discourage the civil rights activities of the appellants. Dombrowski and others were arrested by Louisiana state and local police and charged with violations of the two state statutes. Their offices were raided and their files and records seized. At gunpoint their homes and offices were raided and ransacked by police officers and

trustees of the House of Detention, acting under the direct supervision of the staff director, and the counsel for the State Un-American Activities Committee. The home and office of the director of the Southern Conference Educational Fund were also raided. Judge Wisdom's dissenting opinion in the court below observed that "Among the dangerous articles removed was Thoreau's Journal." Although the court granted a motion to suppress the seized evidence, Louisiana officials continued to threaten prosecution. The grand jury was summoned to hear evidence looking to indictments of the individual appellants. Despite a temporary restraining order issued by Judge Wisdom, the district court dissolved that order and dismissed the complaint. Thereafter, the grand jury returned indictments under the two state statutes against the individual appellants. The appellees repeated announcements that the appellant organization was a subversive or Communist-front organization; that its members must register or be prosecuted—these announcements, together with the other events preceding them, frightened off potential members and contributors.

Under the "special circumstances" present in *Dombrowski,* the Supreme Court held that this was not a case for the application of the doctrine of abstention:

> "We hold the abstention doctrine is inappropriate for cases *such as the present one* where, unlike Douglas v. City of Jeannette, statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities.". 380 U. S. 489-90, 85 S. Ct. at 1122. (Emphasis added.)

It found that "the allegations in this complaint depict the situation in which defense of the State's criminal

prosecution will not assure adequate vindication of constitutional rights." "Here, no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution. . . ." 380 U. S. at 485, 491, 85 S. Ct. at 1120, 1123. But the Court did not repudiate the doctrine of abstention in all cases involving Fourteenth Amendment rights. Where cases do not involve "special circumstances" to justify the exercise of a federal court's equitable powers, it quoted with approval from *Douglas, supra:*

> "In such cases it does not appear that the plaintiffs 'have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court.'" 380 U. S. at 485, 85 S. Ct. at 1120.

The sound principle of abstention alluded to in *Douglas, supra,* is questioned by the plaintiff whenever there is a threat or assumed threat of state prosecution in violation of what the plaintiff terms the "right of expression." The plaintiff assumes that the "right of expression" directed at named political personages embraces the right to express opinions as to such persons behind the mask of anonymity. He points to *Dombrowski, supra,* to support his contention that the defendant in the instant case should be enjoined by this court from prosecuting him in the future for distributing anonymous political literature.

This court does not find present here the "special circumstances" to justify the exercise of federal judicial equity power. There is no suggestion that the alleged

threatened prosecution of the plaintiff in the instant case will be undertaken in bad faith or that the plaintiff's defense to any such prosecution will not assure him adequate vindication of his alleged constitutional rights. In fact, a lower New York state court has already held the statute in question to be unconstitutional for vagueness, *People* v. *Clampitt, supra,* and this plaintiff's conviction in 1964 was reversed in *People* v. *Zwickler, supra,* for failure of proof that he had distributed anonymous political literature "in quantity." This court has no reason to believe that a court, as enlightened and distinguished as the New York State Court of Appeals, will not assure this plaintiff adequate vindication of his constitutional rights.

There is available to the plaintiff a state remedy short of asserting defenses in a criminal prosecution. He may, if he desires, institute an action in the state court for a declaratory judgment. N. Y. CPLR § 3001. *De Veau* v. *Braisted,* 5 App. Div. 2d 603, 174 N.Y.S. 2d 596 (2d Dep't 1958), *aff'd,* 5 N. Y. 2d 236, 183 N.Y.S. 2d 793 (1959), *aff'd,* 363 U. S. 144, 80 S. Ct. 1146 (1960). Should "special circumstances" arise which would not justify further abstention, the parties, of course, may seek appropriate relief in the federal courts.

The plaintiff's motion for a preliminary injunction is denied. The defendant's motion to dismiss the amended complaint is granted. Settle an order consistent herewith on or before ten (10) days from the date hereof.

IRVING R. KAUFMAN,
Circuit Judge.

JOSEPH C. ZAVATT,
Chief Judge.

Appendix B.

FOOTNOTES

[1] "§ 781-b. Printing or other reproduction of certain political literature

No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also so printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal. As amended L. 1957, c. 717; L. 1962, c. 576, eff. Sept. 1, 1962."

[2] "Representative Multer—Explain Your Positions
Aid to Nasser

On September 2, 1964, an amendment was proposed to a foreign aid bill (Public Law 480). In substance, it would have cut off all aid to the United Arab Republic. Congressman Multer spoke at length against the amendment, and in his own words, urged its defeat 'as earnestly as I can'. He stated that his position was based on 'humanitarian instinct' (Congressional Record 20792).

In this respect, the following should be noted

Appendix B.

(a) Congressman Multer's stand permits the diversion of funds by Dictator Nasser to his armaments buildup.

(b) The United Arab Republic is also a recipient of aid from Communist Russia.

(c) Egypt is now employing the technical skills of scientists, formerly under the employ of the Nazis.

(d) Congressman Multer debated against the amendment on the eve of the summit conference held in Cairo by 13 Arab States which are threatening the peace of the Near East and the State of Israel in particular.

Soviet Anti-Semitism

The 1964 Foreign Aid bill was passed in the United States Senate with an amendment sponsored by Senator Abraham Ribicoff (D., Conn.) that strongly condemned the anti-Semitic practices of the Soviet Union. When this issue was brought to the House-Senate conferees, a much more general statement decrying all types of religious bigotry was adopted.

Representative Multer praised this 'watered down' measure on the House floor, and stated:

> 'While the Senate version did point the finger directly at Soviet Russia, the version as finally adopted, I think, is much the better one.'
>
> 'I believe, instead of pointing the finger at the culprit now before the bar of world public opinion where it is being so severely condemned, it is much better that this Congress go on record as it is doing now, against religious persecution wherever it may raise its ugly head.' (Congressional Record 22850)

"Why Mr. Multer. Why ? ? ? ?

[3] "§ 8. [Freedom of speech and press; criminal prosecutions for libel.]

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

[4] See note 2.

Appendix B.

KAUFMAN, *C. J.* (concurring in opinion of Judge Zavatt):

In light of Judge Rosling's dissent, I feel that it is necessary for me to state briefly my understanding of the majority opinion so that its meaning is not lost. The majority lays down no broad rule of federal abstention in cases where freedom of expression is threatened, but rather follows those principles enunciated by the Supreme Court in the *Dombrowski* case. The Court there recognized that "federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. . . . The mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." The facts presented in the appeal before us offer a vivid contrast to those alleged in *Dombrowski.* The illegal raids and threats of prosecution made by Louisiana officials in *Dombrowski,* resembled only too closely those tactics employed by totalitarian regimes dedicated to suppressing freedom of expression. In light of the oppressive circumstances presented in that case, the Supreme Court could well infer that "the State's criminal prosecution will not assure adequate vindication of constitutional rights."

But, such inference cannot be reasonably drawn in the case now before us. Zwickler does not charge that New York state officials have harassed him, or even that he has been threatened with prosecution. Rather he fears that the District Attorney will again, in good faith, prosecute him—a fear that should be somewhat alleviated by the fact that Zwickler's conviction was unanimously reversed by the New York courts in 1965. And, there is no basis for inferring that New York's criminal processes, if invoked, will not assure Zwickler adequate vindication of his constitutional rights. Moreover, Zwickler's exercise of what he believes to be his rights, need not be

"chilled." He need not wait for state officials to act before he can challenge the constitutionality of § 781-b. Rather he may take the initiative and institute a declaratory judgment action in the New York courts; and, in addition he may seek expedition of his case if there is any threat of prosecution—though such a threat seems unreal in light of Zwickler's previous successful encounter with the statute. The Supreme Court's decision in *Baggett* v. *Bullitt*, did not, as Judge Rosling suggests, reject for all time resort to the state's declaratory judgment procedures. Rather, the Court found that "In *these circumstances* [presented in *Baggett*] it is difficult to see how an abstract construction of the challenged terms . . . in a declaratory judgment action could eliminate the vagueness of these terms. It is fictional to believe that anything less than *extensive adjudications*, under the impact of a variety of factual situations, could bring the oath within the bounds of permissible constitutional certainty." 377 U. S. 378. (Emphasis added.). The facts presented in the case before us differ radically. I see no reason to believe that "extensive adjudications" would be required were Zwickler to challenge § 781-b in a declaratory judgment act. And the State courts can adjudicate, as rapidly as the Federal courts, Zwickler's simple contention that the statute is unconstitutional because it is overbroad.

In light of all of these factors, the case now before us does not present those special circumstances found in *Dombrowski* and *Baggett*. Rather, the facts in this case clearly indicate that our discretion will be exercised in the wisest manner if, as is consistent with our federal framework, we permit the courts of the state to deal first with the question raised by Zwickler.

Appendix B.

ROSLING, J.

This dissent is only from so much of the majority's holding that the basic, but residual, question of constitutionality of Penal Law § 871(b) should be passed back to the state courts for adjudication while we abstain. The question of constitutionality, however, is necessarily reached if the dissent correctly holds that we must not abstain. That the provision is unconstitutional for overbreadth the Attorney General in his brief substantially acknowledges by citing the legislative history of the most recent (1962) amendment of the provision as basis for a judicial, possibly, a case by case, narrowing of the law to a constitutional dimension. What he proposes is that the courts by decisional law do what the New York State legislature did by amendment after the state Court of Appeals had stricken down in People v. Mishkin, 17 A. D. 2d 243 (1st Dept. 1962), aff'd 15 N. Y. 2d 671 (1964), the overbroad Section 330 (subd. 2) of the General Business Law.

The statute construed in Mishkin contained a self-identification requirement which swept within its scope *all* publications without distinguishing between that which by reason of its content had forfeited the protection the First Amendment affords, and other matter not thus disentitled. The post-Mishkin amendment, still untested by the courts, expressly restricts its compelled self-identification to what, hopefully, has forfeited constitutional protection as hard core pornography. Mishkin in turn rests on Talley v. State of California, 362 U. S. 60, 80 S. Ct. 536, which held that a city ordinance (Los Angeles) barring distribution of any handbill in any place under any circumstances unless the provenance thereof was noted thereon was unconstitutional as abridging freedom of speech and press secured against such invasion by the First and Fourteenth Amendments.

I do not find in the Talley holding any express or sharply implied qualification of the principle announced that would permit a judicial pruning of a statute thus overbroad in the First Amendment area, so that what remains may be rendered viable.

New York Times Co. v. Sullivan, 376 U. S. 254, 84 S. Ct. 710 (1964), admonishes those in the public eye that constitutional immunity extends to the writers of all that is written in criticism of their public action, even though falsely written, absent a showing of actual malice.

Mills v. Alabama, 384 U. S. 214, 86 S. Ct. 1434, denies to the state authority to censor by penalizing writings made so close to an election, that no time is available for answer. That the voters may be misled by such ex parte and unexposed slanders is at once apparent. But, according to Mills, the policing of the truth to insure that the voter makes a choice uninfluenced by belated falsehood or distortion is not a function of government. Nor does it become the function of government to do so upon a showing that public officials are aided by private persons, however honorable and honorably motivated. Cf. Bantam Books v. Sullivan, 372 U. S. 585, 83 S. Ct. 631 (1963). Nor should we by abstention fail to declare, if precedent has thus determined, unconstitutional a law so patently overbroad.

Baggett v. Bullitt, 377 U. S. 360, 84 S. Ct. 1316 (1964), comments (p. 373) that "[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." Justice White, writing for the court, rejected abstention as inappropriate, for "[i]t is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath [penalties for nonjuring teachers was involved]—within the bounds of constitutional certainty. Abstention does not require this." [id. at p. 378]

Rejected too, by Baggett was resort to a state tribunal for a declaratory judgment on the issue of constitutionality, a suggestion advanced by the majority here. The slow, particularistic process of litigation in state forums and its cost are noted further by Justice White as "inhibit[ing] the exercise of First Amendment freedoms." [id. at p. 378, 379]

Dombrowski v. Pfister, 380 U. S. 479, 85 S. Ct. 1116 (1965), an action brought under the Civil Rights Act, Rev. Statute § 1979, 42 U.S.C. § 1983 (1958 ed.) is discussed at length and passim by the majority of this panel, and is read by them, although not expressly so stated in the opinion, as authorizing the retention of jurisdiction only upon a showing of a context of threats, violence and disorders which by harassment discourages those petitioning this court for relief, from attempting to vindicate their constitutional rights through proceedings in the state courts. Dombrowski strongly and expressly upheld the Baggett principles [id. 491], yet Baggett involved *no* claims of acts of *violence* or of *indignities* visited upon the nonjuring teachers who pressed their suit in the federal forum.

The majority here, it would appear, have read into the principles for which Dombrowski stands, the accidental and adventitious environment of violence, and assigned to it a role integral to the ratio decidendi. Dombrowski, however, does not justify such gloss.

Thus Dombrowski, at p. 486, "we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."

And, quoting NAACP v. Button, 371 U. S. 415 at p. 433, it approves the statement in that opinion which speaks of the "danger of tolerating, in the area of First Amendment

freedoms, the existence of a penal statute susceptible of sweeping and improper application." [id. 487]

Dombrowski decries delay in "vindication of freedom of expression await[ing] the outcome of protracted litigation," and even more forcefully rejects the contention "that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of prosecution, unaffected by the prospect of its success or failure." [id. at p. 487]

But, most significantly, Dombrowski distinguishes its own context from that of Douglas v. City of Jeannette, 319 U. S. 157, 63 S. Ct. 877 (1944), in which there was no atmosphere of state violence or breakdown of the judicial process, the distinction being on grounds which make clear that although the presence of violence and other disruptive circumstances may dictate retention, their absence does not, conversely, dictate abstention.

Dombrowski declares [pp. 489-490]: "We hold the abstention doctrine is inappropriate for cases such as the present one where, unlike Douglas v. City of Jeannette, statutes are justifiably attacked *on their face* OR as *applied* for the purpose of discouraging protected activities." [Emphasis supplied] Only the second of the alternatives cited contemplates violence as of material relevance. The first alternative, instanced by our proceeding, needs only a statute void on its face as the pivotal condition for retention of a First Amendment suit where chilling is a natural consequence of our abstention. See excerpt from Baggett, supra p. 3.

Finally, and in my view conclusive upon us as obliging us to retain, is the statement in Dombrowski which declares the sequence of the Federal and State procedures when the statute is thus overbroad on its face.

> "The State must, if it is to invoke the statutes after injunctive relief has been sought, assume the burden

> of obtaining a permissible narrow construction in a noncriminal proceeding *before* it may seek modification of the injunction to permit future prosecutions. * * * Our view of the proper operation of the vagueness doctrine does not preclude district courts from modifying injunctions to permit prosecutions in light of subsequent state court interpretation clarifying the application of the statute to particular conduct." (380 U. S. at 491-492). [Emphasis supplied]

The Dombrowski principle is summed up in forthright language (p. 494) taking note of life's realities and the fact that not all men are willing to accept martyrdom. It reads:

> "So long as the statute remains available to the State the threat of prosecutions of protected expressions is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression."

Once the thesis is accepted that § 781(b) is invalid at least for overbreadth in its indiscriminate application to both the constitutionally protected writing which, though anonymous, may be circulated without penalty, and that which by reason of malicious falsehood must certify its origin or be in violation, the question arises as to the one who shall so assess the contents and at what stage this shall be done. For answer § 781(b) must be read in association with Executive Law § 69. That provision at the same time authorizes as it obligates, the Attorney-General to investigate crimes against the Elective franchise. The sifting process which he, through his deputies, engages in, to implement § 781(b) in its judicially narrowed dimension, may with all good heart be intended only for the culpable. Its chill will, nevertheless, be felt in a prior restraint by those whose writings, though not self-identified, may be

emitted freely, and should be, not only without penalty, but equally without fear of penalty. Chilling that freedom is impermissible censorship. See People v. Clampitt, 34 Misc. 2d 766; North End Democratic Club v. Attorney General, 31 Misc. 2d 1000; People v. Zwickler, (Crim. Ct., N. Y. City, Kings Co., Feb. 10, 1965, unreported) "[j]udgment of conviction unanimously reversed on the facts," (Sup. Ct., App. T., 2d Dept., April 23, 1965, unreported), aff'd without opinion 16 N. Y. 2d 1069 (1965).

Justice Black in Talley at p. 539 cites as significant Hallam's Constitutional History of England and the Letters of Junius. The organ tones of Milton two centuries earlier in Areopagitica provide the wellsprings at which these authors surely drank.

"For who knows not," the mighty advocate asked, "that Truth is strong next to the Almighty?" and gave his own answer. "She needs no policies, no stratagems, nor licensings to make her victorious; those are the shifts and the defences that error uses against her power."

I would grant the plaintiff's motion declaring § 781(b) unconstitutional as in violation of the First and Fourteenth Amendments to the Constitution of the United States and enjoining its enforcement.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 829

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL TO THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL TO THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM

Appellee Aaron E. Koota, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss on the ground that the appeal is not within the jurisdiction of this Court, or in the alternative, to affirm on the ground that the questions presented are so insubstantial as not to warrant further argument.

Statement

This is a direct appeal from an order of a statutory three-judge Court, entered in the United States District Court for the Eastern District of New York on September 29, 1966

(Statement as to Jurisdiction, Appendix A), which denied appellant's application for a preliminary injunction and granted appellee's motion to dismiss the complaint.

The appellant brought this action for a declaratory judgment and an injunction to enjoin the appellee, as District Attorney of Kings County, from prosecuting him under New York Penal Law § 781-b which probihits, *inter alia,* the distribution of anonymous political literature in quantity.* The amended complaint challenges the constitutionality of Penal Law § 781-b on the ground that "it infringes upon the rights of the plaintiff under the First and Fourteenth Amendments to the Constitution of the United States."

Although alleging that he "desires and intends to distribute" anonymous political leaflets in Brooklyn with regard to the election campaign of 1966 (Amend. Compl., par. 14), appellant fails to allege either in the amended complaint or in any papers submitted to the Court below that he actually distributed anonymous political literature in 1966 or that he was being prosecuted for any such distribution. Rather, appellant bases his amended complaint upon the fact that he was previously charged with a violation of Penal Law § 781-b for distributing an anonymous political leaflet during a 1964 congressional campaign and found guilty after a trial (at which he presented no evidence). *People* v. *Zwickler* (Crim. Ct., N.Y.C., Kings Co., Feb. 10, 1965, unreported). The judgment of conviction was "unanimously reversed on the facts" by the Appellate Term upon the failure of the People "to establish that defendant distributed anonymous literature 'in quantity' ". *People* v. *Zwickler* (Sup. Ct., App. T., Kings Co., April 23, 1965, unreported). The New York Court of Appeals affirmed, without opinion, the reversal of the judg-

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* New York Penal Law § 781-b is set forth at pp. 2-3 of the Statement as to Jurisdiction.

ment of conviction. *People* v. *Zwickler* 16 N. Y. 2d 1069, 266 N.Y.S. 2d 140 (1965).

The amended complaint does not challenge the appellee with any act of bad faith. On the contrary, it alleges that appellee "is a diligent and conscientious public officer and pursuant to his duties intends or will again prosecute the plaintiff for his acts of distribution . . ." (Amend. Compl., par. 18). However, the amended complaint fails to set forth any facts which would support the claim that appellee presently "intends" to prosecute plaintiff for any acts of distribution.

In invoking the principle of abstention, a majority of the statutory Court found that none of the special circumstances which were present in *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), were applicable here (Statement as to Jurisdiction, Appendix B). Both Judges Zavatt and Kaufman noted that the prosecution in the instant case was not being charged with bad faith; that prior New York decisions with regard to the challenged statute indicate appellant's opportunity to vindicate his alleged constitutional rights before the New York State courts; and that if appellant does not wish to assert his defenses in a criminal prosecution, he may obtain expeditious relief by instituting an action in a state court for declaratory judgment.

ARGUMENT

I

The application of the principle of abstention by the District Court, under the circumstances of this case, was manifestly a proper exercise of equitable discretion.

In abstaining from deciding the purported constitutional challenge to New York Penal Law § 781-b prior to its determination by the New York State courts, the District

Court was adhering to one of the most basic principles of federalism that has been enunciated by this Court. In speaking of the principle of abstention, this Court stated in *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167, 176-177 (1959), that:

> "no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. See, *e.g.*, *Railroad Comm'n* v. *Pullman Co.*, [312 U. S. 496]; *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101; *American Federation of Labor* v. *Watson*, 327 U. S. 582; *Shipman* v. *DuPre*, 339 U. S. 321; *Albertson* v. *Millard*, 345 U. S. 242; *Government & Civic Employees* v. *Windsor*, 353 U. S. 364. This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication."

The need to apply the principle of abstention, particularly with regard to attempts to enjoin the enforcement of state criminal laws, was recently restated in this Court by *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), where the Court recognized that (pp. 484-485):

> "federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

In *Dombrowski,* the existence of special and oppressive circumstances led this Court to reject abstention since it concluded that "the defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights". The allegations in the complaint in *Dombrowski,* supported by affidavits and a written offer of proof, indicated total lack of good faith on the part of the prosecution in enforcing the statutes. The record in *Dombrowski,* with its history of prosecution raids at gunpoint in the offices and homes of civil rights organization members, the seizure of files and books, and the continued prosecution of appellants after motions to suppress the seized evidence were granted for lack of probable cause, all showed that criminal processes were not being invoked with any hope of ultimate success, but only to discourage appellants' civil rights activities. The continued harassment of the appellant organization in *Dombrowski* had frightened off potential members and contributors with the result that such organization was faced with extinction if required to defend all the threatened state prosecutions. Moreover, appellants were not only indicted under overly broad and vague statutes inhibiting free expression, but were threatened with future prosecution under other statutory provisions of the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law. Under those circumstances, this Court found that even with a series of state criminal prosecutions, there was no certain or immediate prospect that appellants would be provided with a satisfactory resolution of the constitutional issues in the state courts.

In bringing this appeal, appellant attempts to rely principally upon the *Dombrowski* decision, but without showing that any of the "special circumstances" which led to the rejection of abstention in *Dombrowski* applies to the instant case. In fact, no similarity between the circumstances in *Dombrowski* and the instant complaint can be drawn.

Here, there is no allegation that the prosecution has acted in bad faith or has even threatened appellant with prosecution. On the contrary, appellee is described in the complaint as a "diligent and conscientious public officer" (par. 18) and only because of this "diligence" does appellant believe he would be prosecuted if he violated Penal Law § 781-b.

Unlike *Dombrowski,* there is no basis for inferring in this case that appellant will not be able to adequately vindicate his constitutional rights in the state courts if New York's criminal processes are invoked. Indeed, a lower New York state court has already held the challenged statute (prior to its 1962 amendment) to be unconstitutional for vagueness, *People* v. *Clampitt,* 34 Misc. 2d 766, 222 N.Y.S. 2d 33 (Spec. Sess., N. Y. Co., 1961), and appellant's conviction in 1964 was reversed in *People* v. *Zwickler, supra,* for failure of proof that he had distributed anonymous political literature in quantity.

If appellant does not wish to wait for a criminal prosecution to assert his challenge to the constitutionality of § 781-b, he may institute an action for declaratory judgment in the state court under N. Y. CPLR § 3001.* As the State Appellate Division said in *DeVeau* v. *Braisted,* 5 A. D. 2d 603, 607 (2d Dept., 1958), *aff'd* 5 N. Y. 2d 236, *aff'd* 363 U. S. 144 (1960), in upholding the use of declaratory judgment to test the validity of a penal statute:

> "One of the very purposes of a declaratory judgment is to settle a serious question of law as to the validity of a statute which would be the basis of a threatened prosecution for crime, without requiring, as a pre-

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* N. Y. CPLR § 3001 provides:

"The Supreme Court may render a declaratory judgment having the effect of a final judgment to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or can be claimed. If the court declines to render such a judgment it shall state its grounds."

requisite to judicial entertainment of the question, that interested parties first commit the very acts which are involved in the dispute and thereby run the risk of such prosecution . . ."

See, also, *New York Foreign Trade Zone Operators, Inc.* v. *State Liquor Authority,* 285 N. Y. 272 (1941); *Bunis* v. *Conway,* 17 A. D. 2d 207 (4th Dept., 1962), app. dism. 12 N. Y. 2d 882; *Bookcase Inc.* v. *Broderick,* 49 Misc. 2d 351, 267 N. Y. 2d 410 (Sup. Ct. N. Y. Co., 1965). It should be noted that the latter two cases both sustained the use of declaratory judgment to test the constitutionality of penal statutes that were attacked as infringing on First Amendment rights. It is particularly surprising that appellant's counsel in the instant case did not first resort to an action for declaratory judgment in the state court since he had successfully argued that such remedy was the most appropriate way of testing the validity of a censorship statute when serving as counsel for the plaintiff in the *Bookcase* action, *supra.*

Finally, in contrast to the situation in *Dombrowski* where appellants were faced with the ordeal of having to defend a series of criminal prosecutions under different and hopelessly vague statutory provisions with no hope for an immediate and certain resolution of the constitutional issues raised, appellant here, has singled out one section of law which can be decided immediately—assuming the proper jural relationship has been established—in a declaratory judgment action in the state court.

Appellant has interpreted the *Dombrowski* decision to require a federal district court, to discard the principle of abstention whenever a First Amendment question is raised, regardless of any showing of special circumstances and despite the availability of expeditious relief in the state courts. No opinion of this Court lends support to appellant's theory which would scrap a basic principle of federalism by the mere insertion of a few words of

pleading in the complaint. Under the circumstances of this case, there can be no question that the District Court acted correctly in applying the principle of abstention.

II

The amended complaint presents an issue of a hypothetical and abstract nature rather than a justiciable controversy which could serve as a basis for declaratory judgment in the federal courts.

It is fundamental that federal courts may only adjudicate actual controversies and will not issue advisory opinions or decide abstract, hypothetical or contingent questions. *Government and Civic Employees Organizing Committee, C.I.O.* v. *Windsor,* 353 U. S. 364, 366 (1957); *United Public Workers* v. *Mitchell,* 330 U. S. 75, 89-90 (1947); *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461 (1945). To avoid the adjudication of hypothetical issues, this Court has insisted that constitutional questions be presented in concrete rather than abstract form and only at the insistence of one who can show that he is immediately threatened with harm by the challenged action. *Poe* v. *Ullman,* 367 U. S. 497, 503-505 (1961); *Government and Civic Employees Organizing Committee, C.I.O.* v. *Windsor, supra; Rescue Army* v. *Municipal Court,* 331 U. S. 549, 575, 584 (1947).

An examination of the amended complaint can serve only to illustrate the abstract, hypothetical nature of appellant's case. There is no allegation that appellant has taken any action to distribute anonymous political literature in violation of the statute he attacks.* Instead, there is only

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* Since the political literature appellant intended to distribute all related to the 1966 congressional candidacy of Abraham Multer (Statement as to Jurisdiction, App. pp. 27-28), this matter now might be properly dismissed for mootness. Cf. *Lomenzo* v. *WMCA, Inc.,* 384 U. S. 887 (1966).

a statement of intention that appellant desires to distribute such literature. There is no allegation that appellee has taken any step to prosecute appellant. Instead, there is only the speculative charge that since appellee is a "diligent and conscientious public officer", he would prosecute appellant if he distributed anonymous political literature in the future. Of course, the actual facts and circumstances which would serve as the basis for a future indictment could not possibly be spelled out in the complaint.

Thus, while the propriety of the action of the Court below in abstaining cannot seriously be questioned, that Court might also have dismissed the amended complaint for failing to present a justiciable controversy in clear and concrete form warranting an action for declaratory judgment in a federal court.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed, or, in the alternative, the order of the three-judge court of September 29, 1966 should be affirmed.

Dated: New York, New York, December 19, 1966.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~810~~ 29

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL TO THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 810

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION

Appellant submits the following observations and contentions in opposition to appellee's motion to dismiss or affirm.

Statement

Although this action was brought for the purpose of avoiding martyrdom to Zwickler who is attempting to exercise First Amendment rights, he was met with a dismissal of his complaint by the District Court, Rosling, J., dissenting, on the ground that the federal court should abstain from deciding the case, irrespective of its merits. This case with its three separate opinions has already become a conspicuous case in the Second Circuit, and unless reviewed or commented upon by this court, will facilitate the brooming out from the District Courts lying within the

State of New York of all actions seeking a declaration of the invalidity of state statutes on the ground that they are repugnant to the Constitution of the United States. Since the rationale of the District Court is that the existence of the remedy for a declaratory judgment in New York courts is sufficient good reason for abstention, it is not improbable that the decision in this case will become the basis for future similar decisions. Although the opinion of the court in this case is only a few months old, and not even reported, it has already been cited for the decision in *Fenster* v. *Leary,* No. 905, October Term 1960; docketed on December 27, 1966, and which in turn was used in *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation of the City of New York,* Southern District of New York, Docket No. 66, Civ. 4307, decided December 27, 1966. Thus, at least 5 federal judges sitting in the City of New York have already found favor with the principle adopted. For this reason alone, the order should be reviewed.

In support of his motion, the appellee relies on the opinion of the District Court. The response to that argument was anticipated in the Statement as to Jurisdiction and need not be repeated here. The response is also found in the dissenting opinion. What the appellee in effect argues is that the court below was correct. Zwickler addresses himself to the question before the court: Is there substantiality to his appeal? There is substantiality. This is manifest not only by the division in the District Court, but also in novelty and importance of the substantive and procedural questions presented. On the substantive side, this Court has never passed upon the validity of a statute which punishes the dissemination of anonymous political literature. On the procedural side, this case is becoming a precedent in the Second Circuit for ridding the federal district courts, sitting in New York, of similar cases, as disclosed under "Statement", above. Correction, or at

least suggestion by this court is thus needed. On both points, therefore, it is necessary that this case be reviewed.

Lest it should escape attention, a fact should be added in reply to appellee's suggestion (*Motion,* p. 6) that Zwickler in order to learn his constitutional rights, should again violate the law. The trial court on his first prosecution, held in an unreported opinion that the statute is constitutional (Statement as to Jurisdiction, p. 15).

As to appellee's contention (*Motion,* p. 8) that Zwickler's position is hypothetical,—nothing could be further from reality. Even the District Court explicitly said it had jurisdiction because an actual case and controversy is presented (Statement as to Jurisdiction, p. 17, last line, "It alleges a case or controversy which is within the adjudicatory power of this court").

Indeed, Zwickler's plight is no different in kind or degree from that of Evers in *Evers* v. *Dwyer,* 358 U. S. 202, where this court on squarely similar facts held that there was a case and controversy. Evers, it will be recalled, attempted to sit in any seat in a segregated bus. Upon his refusal to sit in a seat designated for black persons, he was told to comply with the municipal ordinance or meet the penalties of non-compliance. Rather than comply, he left the bus and instituted an action to declare the ordinance invalid. This court expressly held that a controversy existed. Zwickler is in every respect in a similar controversy. Zwickler was prosecuted under the statute; the statute was held constitutional; and he was convicted. He seeks to distribute the anonymous pamphlet not only during the elections of 1966, but at subsequent events. He is afraid to do so, because of what had happened to him. In his case, he is not merely chilled in the exercise of his rights. He is frozen. He cannot function because of his anxieties. He did not make distribution immediately prior

to the 1966 election because of fear of the existing statute. He also fears to make distribution in the future. Unless he gets protection by this litigation, he will *not* exercise his First Amendment rights. The statute thus inhibits presently and immediately with the exercise of those rights.

Moreover, it should be noted, Zwickler has greater reason to be apprehensive than Evers. Zwickler, as distinct from Evers, was actually prosecuted and had an opinion from the trial court that the law is constitutional. Zwickler, as distinct from Evers, had the district attorney pursue him by the People's appeal to the New York Court of Appeals.

As to the intimation lurking in a footnote that this case is now moot because the 1966 election passed during this litigation (a confirmation of the observations on the delays in exercising First Amendment rights under "Conclusion" in the Statement as to Jurisdiction, p. 10), the complaint as well as the District Court show that Zwickler is not seeking to enforce his First Amendment rights only with respect to the election of 1966, but "subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign. Such distribution is intended to be made in quantities of more than a thousand copies of such anonymous leaflet" (Complaint, par. "Fourteenth" and Statement as to Jurisdiction, p. 14). It could not be seriously contended that Zwickler should be required to institute an action before each intended distribution. All of which emphasizes that it is necessary that relief be afforded in this case, because the attrition of litigation presupposes the passage of time.

CONCLUSION

For the foregoing reasons the motion should be denied and the court, instead, should note probable jurisdiction.

Dated, January 1, 1966.

Respectfully submitted,

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SUPREME COURT, U. S.

AUG 21 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 29

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL TO THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 29

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL TO THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

Opinions Below

The opinion, concurring opinion and dissent in the District Court (R. 19-33, 35-44) are reported in 261 Fed. Supp. 985.

Jurisdiction

The order of the three-judge district court was made and entered on September 29, 1966. The notice of appeal to this court was filed in the district court on October 28, 1966. The jurisdiction of this court is conferred by 28 U.S.C. Section 1253.

Questions Presented

1. Is Section 781-b of the Penal Law of the State of New York repugnant to the Constitution of the United States in that it is a restraint on freedom of expression?

2. Should the District Court have abstained from deciding the constitutional question squarely involved under the Constitution of the United States?

3. Should the District Court have dismissed the amended complaint without rendering judgment on the merits of appellant's constitutional claims?

Statute Involved

The statute involved is Section 781-b of the Penal Law of New York (McKinney's Consolidated Laws of New York, volume 39).

Section 781-b:

> "No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof

and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also so printing, publishing or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

"The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal." L. 1941 ch. 198.

Section 782 provides as follows:

"Any person convicted of a misdemeanor under this article shall for a first offense be punished by imprisonment for not more than one year, or by a fine of not less than one hundred dollars nor more than five hundred dollars, or by both such fine and imprisonment. Any person convicted of a misdemeanor under this article for a second or subsequent offense shall be guilty of a felony."

Statement

The appellant commenced this action on April 22, 1966 for a declaratory judgment and injunction in the United States District Court for the Southern District of New

York. The appellant alleged that he had been previously convicted for a violation of Section 781-b in that he had distributed an anonymous leaflet commenting upon a candidate for the Congress of the United States. Upon his appeal, his conviction was reversed because of the insufficiency of the evidence. Thereafter, the appellee as district attorney pursued the case to the Court of Appeals, the highest court in New York, which affirmed the reversal of the conviction, without opinion, *People* v. *Zwickler,* 16 N. Y. 2d 1069. The appellant, however, in expectation of a renewal of the candidacy of that person wishes to renew the distribution by him of the anonymous leaflet. But he was mindful of his previous conviction and his involvement in a prior prosecution all the way to the Court of Appeals. He was also mindful that the statute is such that a second conviction under it is a felony, with all its attendant disabilities in New York. He therefore fears to make distribution. He will not risk another prosecution and has thus been prevented from making distribution. Because of this fear he refrained from distribution during the 1966 election and while this litigation was pending. His interest in expressing himself is thus chilled by the perils and difficulties associated with such expression.

He also alleged that the appellee is a diligent prosecutor who had previously pursued him to the Court of Appeals and intends to again prosecute him and that because of the threats of prosecution of him, the appellant fears to exercise his right of expression by the distribution of the anonymous leaflet. Appellant alleges that he desires to distribute the leaflet in large quantities during the 1966 (the complaint was filed in April 1966) and subsequent election campaigns or in connection with the election of party officials, nominations for public office and party position that may occur *after* 1966.

He therefore prayed that the court declare Section 781-b to be repugnant to the Constitution of the United States and to enjoin its enforcement.

The appellant moved for an interlocutory injunction and for the convening of a three-judge statutory court. The appellee moved to dismiss the complaint on the ground that it did not state a claim upon which relief could be granted.

The motion to convene a three-judge court was granted. It was convened and a hearing was held. That court by a vote of 2-1 denied relief to the appellant and granted appellee's motion to dismiss the amended complaint.

It should be added that at the hearing counsel stipulated that the court should treat the hearing as one for final judgment (R. 17-18). Indeed, the facts are matters of public record (*People* v. *Zwickler*, 16 N. Y. 2d 1069).

The majority held that although it had jurisdiction, it should nevertheless abstain from granting the relief. Judge Rosling in a dissenting opinion held that since it was clear that the statute was unconstitutional as an infringement of appellant's freedom of expression, and also a denial of due process by overbroadness, the decisions of this court commanded that relief should be afforded to appellant.

Summary of Argument

To satisfy any rule that demands a clear showing of the unconstitutionality of a state statute before a district court should exercise its equitable jurisdiction, the appellant takes up the substantive question first.

He argues that the statute is repugnant to the Constitution because it is a restraint on free expression. Conceding the statute is directed against libelous and false statements, as urged by the appellee below, the statute nevertheless suppresses literature. The effect of the statute is suppression akin to suppression of seditious libel. At least in the case of seditious libel the aim is directed at the con-

tent of the literature. In the case of anonymity the aim is misdirected; the target is an historically protected mode of expression.

Since at least since *Thomas* v. *Collins,* 323 U. S. 516, this court has held that there can be no state requirement that a person who speaks orally in public should be required to identify himself. Likewise, written statements should not be required disclosure of their author. We urge that *Talley* v. *California,* 362 U. S. 60 teaches the principle, that all anonymous utterances are protected.

From a practical point of view, it is impossible for an author to determine *in advance* whether the writing he wishes to publish anonymously will meet with approval with this statute, construed as urged by appellee. Nor is it possible from a practical point of view for him to get a declaratory judgment in advance. Consequently, he would, in fear of the statute, be discouraged from publishing. The very existence of the statute produces the chill.

As to the decision of the district court to abstain, appellant contends that the recent decisions of this court in several cases have announced that a three-judge court convened to pass upon the constitutionality of a state statute should not obstain when a First Amendment claim is made. This is especially true when the statute is attacked on its face, since this court has rejected abstention even in cases of unconstitutional application of a statute.

The emphasis on the exercise of jurisdiction is the need for an expeditious determination of the validity of a statute which restrains expression, for delay in such cases usually spells destruction of the right of expression.

ARGUMENT

I

The statute, even if construed to apply to obnoxious literature, is an unconstitutional restraint on expression.

Analysis of the statute discloses that it is directed against anonymous material when disseminated in connection with:

(1) any election of public officers

(2) party officials

(3) candidates for nomination for public office

(4) party position

(5) proposition or amendment to the state constitution; concerning the following:

(a) a political party

(b) candidates

(c) committee

(d) person

(e) proposition to the state constitution

(f) amendment to the state constitution.

The statute does not textually speak against false or libelous statements.

This point assumes that even if the statute contained such words or were construed to prohibit anonymous literature (appellee urged below) that was false or libelous, nevertheless, such a statute operates as a restraint upon the dissemination of literature.

This court in *Talley* v. *California,* 362 U. S. 60, held that a statute which forbade the dissemination of anonymous pamphlets was repugnant to the Constitution. There, the statute did not isolate the type of anonymous literature forbidden (see also, *People* v. *Mishkin,* 17 A. D. 2d 243; affd. 15 N. Y. 2d 671 and the subsequent amendment of the statute by the Laws of 1963, Chapter 703).

In *Talley,* a Los Angeles ordinance forbade distribution of handbills which did not have printed on their face the name and address of the printer and the person who caused distribution and sponsorship of the handbill. The defendant was arrested for violating the ordinance in that he had distributed a handbill of the National Consumers Mobilization which urged a boycott against certain businessmen who were named, because they carried products of manufacturers who would not offer equal employment to Negroes, Mexicans and Orientals. The Appellate Department of the Superior Court of the County of Los Angeles rejected defendant's contention that the ordinance invaded freedom of speech under the Fourteenth and First Amendments. This court held the ordinance unconstitutional, as too broad and in no way limited to pamphlets whose contents were obscene or offensive to public morals or advocated unlawful conduct.

This court held that the statute was not limited either by its text or legislative history to a means of identifying those responsible for fraud and libel. Therefore, this court did not pass on the validity of an ordinance limited to prevent those evils. "The ordinance bars all handbills under all circumstances anywhere."

This court, in a recent series of cases, consistently followed and reaffirmed the principle that disclosure cannot be compelled when reprisals or injury will result. *Bates* v. *Little Rock,* 361 U. S. 516 and *National Association for the Advancement of Colored People* v. *Alabama,* 357 U. S. 449, in which the court held that persons associated to

disseminate ideas could not be compelled to identify the members; *Shelton* v. *Tucker,* 364 U. S. 479, where an individual teacher, as distinguished from the group in the *Bates* and *NAACP* cases, could not be required to identify organizations in which he was a member. *Lamont* v. *Postmaster General,* 381 U. S. 301, in which this court struck the requirement that a recipient of a publication disclose himself.

The force of these decisions is not attenuated by older decisions, such as *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288, where disclosure was required for the exercise of the privilege of the use of second-class mail; and *United States* v. *Harriss,* 347 U. S. 612, requiring identification of lobbyists before Congress. These cases can be distinguished: The *Lewis* case in that the privilege might be renounced, as the price, though a heavy one, by one who sought anonymity. The periodical could resort to anonymity, without suppression, by government fiat, if it wished to pay the price. An entirely different case would arise if all anonymous mailings were barred. And it should not be overlooked that even periodicals enjoying second class mail privileges, nevertheless carry articles and letters that are anonymous. The *Harriss* case deals with a special situation relating to Congress. It does not compel disclosure to the public in general, but merely to members of Congress. In any event, if these cases cannot be so distinguished, it can be said they have been disregarded or perhaps overruled *sub silentio* by the subsequent decisions.

The fact that 36 states have similar laws to the statute under attack, does not render this statute immune from attack as "the overwhelming public policy of the Nation" (Justice Clark dissenting in *Talley,* p. 70). In *Winters* v. *New York,* 333 U. S. 507 (see dissent of Justice Frankfuter), a statute was 60 years old and at least 20 states had similar statutes. Yet this court found the statute repugnant to the Constitution.

Nor is it necessary that the distributor, as his burden, furnish proof of economic reprisal, loss of employment or physical danger. It is sufficient that reprisal is inherent in the act of anonymous dissemination. What the First Amendment aims at is the chilling effect of the fear of dissemination that would result from a compelled disclosure.

Here, the statute is more particularized than that in *Talley*. From the analysis, it is readily discernible that the subject matter of the statute is that most readily protected by the First Amendment. The subjects are candidates for public office, political parties and amendments to the state constitution. Of all discussions within the intendment of free speech, these are the most favored!

Yet, this statute is specific in condemning anonymous criticism of persons of public interest, in a manner akin to seditious libel. True, the statute does not, as in seditious libel, proscribe the content of the writing. It restricts itself to condemning anonymous criticism. We contend, however, that the operation of the statute is to create a restraint which has the effect of a seditious libel statute.

Although *Talley* v. *California* is a decision limited as to the scope of the statute, nevertheless, it guides this case. There, it was pointed out how large a part anonymous literature has played in history, especially in political life. The *Federalist** and *Junius' Letters* are some of the examples of 18th century political activity. Indeed, the history of the formative stage of the United States reveals a period of most frequent publication of anonymous and

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* Had this law been in effect in the days of Hamilton and Jay, New York lawyers, serious difficulty would have been their lot, because of their multiple contributions to the Federalist Papers, which they published anonymously under the title of "An Address to the People of the State of New York", 12 Encyclopedia Britannica, page 981, "John Jay". Under the statute, a second conviction is a felony, which to a lawyer means automatic disbarment (Judiciary Law, Section 88 (3)).

scurrilous literature dealing with political candidates and constitutional provisions, so much so that Washington and Jefferson writhed under the discomforts produced by free speech. Bleyer, History of American Journalism, 23, 79, 90-93. Collier's Encyclopedia 1965, Volume 11, page 609, column 1.

Anonymity has had a history as long as the history of literature itself. Since religion pervaded early history, it is not surprising that heresy (or the dissent from current popular views) sought anonymity. And this history has extended to our times where blacklisting and other reprisals haunt the author of unpopular and perhaps erroneous views.

The catalog of anonymous literature is a long one. Some of it appears in the *Talley* case. It would serve no purpose in this brief in an elaborate display of its history, for it is a matter well within the knowledge of this court. Besides Bleyer, *op. cit.*, the following contain material that points up the long history of anonymous publications: Taylor and Mosher, The Biographical History of Anonyma and Pseudonyma, University of Chicago Press (1951); Halkett & Laing, Dictionary of Anonymous and Pseudonymous English Literature (1926); Encyclopedia Britannica, Volume 2, page 7 (Fourteenth Edition).

We start with an important premise. It is a premise because it has won the imprimatur of this court: If the utterances were oral, a statute that required identification or registration of the speaker would have run afoul of the Constitution. *Thomas* v. *Collins,* 323 U. S. 516, supports that view. In that case, a speaker was held in contempt for having spoken without complying with a court order issued under a statute that required him first to register, so that he might be identified. This court struck down that law, saying:

> "As a matter of principle a requirement of registration in order to make a public speech would seem gen-

erally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers. And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assmble and discuss their affairs and to enlist the support of others.

"If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

Therefore, a speaker can get up on a platform without any identification, true or otherwise and make any statement, subject of course to the existing restraints on speech. But the point is that he does not have to identify himself.

In which way does handing out a leaflet differ from the oral statement? If the distribuutor of the leaflet were a

mute, the test is clear, for the mute merely substitutes one medium of expression for the one in which he is deficient. The answer is that both methods are media of expression, and therefore, the doctrine in *Thomas* v. *Collins* applies to written communication as well as to oral expression.

Basically, the entire concept of free speech rests on the assumption derived from centuries of scholarship and philosophy, that truth rests on its own supports for acceptance, and not on the name of its utterer. Holmes, J. in *Abrams* v. *United States,* 250 U. S. 616, Brandeis, J. in *Whitney* v. *California,* 274 U. S. 357, 375, Black, J. in *Adler* v. *Board of Education,* 342 U. S. 485, 496. Justice Black in *Talley* (p. 64) succinctly put it:

> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' Lovell v. Griffin, 303 U. S., at 452.
>
> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions

designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

"We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. Bates v. Little Rock, 361 U. S. 516; N.A.A.C.P. v. Alabama, 357 U. S. 449, 462. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it, like the Griffin, Georgia, ordinance, is void on its face."

See also, the concurring opinion of Justices Black and Douglas in *United States* v. *Rumely*, 345 U. S. 41, 56. In that case, Rumely was convicted of contempt of Congress for having refused to disclose to a Congressional Committee, the names of the purchasers of his books which he had on sale.

If an author were compelled to disclose his name in every case, it might deter him from publishing what may be of supreme importance to the public, especially, as in

this case, concerning political candidates and political ideas. It is this deterrence which acts as a restraint on ideas and thus violates the First Amendment. This too, should answer any query (see Justice Clark in *Talley*, p. 70) as to where in the Constitution is to be found any edict against anonymous publications.

See, The Constitutional Right to Anonymity: Free Speech, Disclosure and The Devil, 70 Yale Law Journal 1084, for a comprehensive discussion of the subject. See also, Anonymity: An Emerging Fundamental Right, 36 Indiana Law Journal 306.

There still remains to be discussed what the effect false and libelous statements would have on anonymous distribution. In considering this question, care must be taken to separate the function of anonymity from the content of speech itself: In the realm of speech this court has been careful to protect the content of speech, even if the speech is obnoxious to the audience or does not comport with current standards: *Lovell* v. *Griffin*, 303 U. S. 444; *Jameson* v. *Texas*, 318 U. S. 413; *West Virginia Board of Education* v. *Barnette*, 318 U. S. 624; *Kingsley International Pictures* v. *Board of Regent*, 360 U. S. 64; *Staub* v. *Baxley*, 355 U. S. 317; *Speiser* v. *Randall*, 357 U. S. 513.

Assuming that the Constitution does not protect the libelous or the false expression, sanctions might be formulated to provide a remedy to deal directly with those evils. But that has nothing to do with anonymity. Anonymity in such a case could only prove as a nuisance toward ascertaining the utterer, a nuisance akin to the task of an investigator in any other case where identity is sought. But should such a nuisance be enough to abolish the right and benefits of anonymity that has been history of literature from time immemorial? This court in *Schneider* v. *New Jersey*, 308 U. S. 147, had before it the question of the balancing of interests, when faced with the question whether distribution of pamphlets in the streets are to

be free as against the nuisance of littering of the streets. This court voted in favor of eliminating restraints on speech as against the possible nuisance of the streets becoming littered. There was always the remedy against the purposeful litterer as there would be against the malicious libeler, who might have to be identified with some effort. And in this connection it should not be overlooked that the use of pseudonyms, nom de plumes and false names creates as much of a nuisance of attempted detection as does the complete absence of a name. So that the remedy sought by the statute (as appellee has contended) to furnish a means of locating a malicious libeler, is illusory.

As to any argument that it is necessary there be disclosure distributed on the eve of an election, so that a candidate may be in a position to rebut, the answer is that the argument is confused. Disclosure is not a necessary part of answering back. Anonymity has nothing to do with the ability of a candidate to answer back. The candidate could answer back whether the author of obnoxious material is disclosed or not. This contention is fortified by this court's decision in *Mills* v. *Alabama*, 384 U. S. 214, where this court held unconstitutional, a statute which forbade comment on election day, if it urged people to vote in a particular manner.

Insofar as the recognized evil of fraud or palming-off is concerned, compelled disclosure is not the remedy. If, for example a Democratic candidate should broadcast a leaflet falsely signed as by a Republican with the aim of injuring the Republican candidate, the remedy is not to require disclosure of the author. The remedy is by sanctions directly against the fraud.

Punishment for anonymity provides no remedy for the supposed evil. It merely adds an additional penalty to the one that should be imposed directly. If the aim of statute is to eliminate an evil, it is thus far off target.

A falsity can be stated with or without the name of the author affixed.

It is not amiss to observe that concern about the identity of a perpetrator of seditious libel or untrue statements has been considerably watered down by this court's very recent pronouncements in *New York Times* v. *Sullivan,* 376 U. S. 254; *Garrison* v. *Louisiana,* 379 U. S. 64; *Time Inc.* v. *Hill,* 385 U. S. 374; *Mills* v. *Alabama,* 384 U. S. 214. Those cases have limited the instances in which an action for a false, libelous or untrue statement may be brought; so that the practical operation of the New York statute as an instrument to aid libel actions, is at best, minimal.

The statute under attack here, if adjudged valid with respect to false and libelous statements would only serve to involve the courts in the dark labrynths of determining the contents and character of a publication before it can approve anonymity.

But as Judge Rosling, dissenting below, put it so well, albeit cryptically, that before the judiciary makes a determination in a given case of permissible anonymity, the chilling effect on publication has aleady occurred. The courts in such a case would come into play only *after* a given event. There could be no determination of permissible anonymity *before* the publication. There could be no declaratory judgment of permissible anonymity, because the petitioner in such a case would at some stage be revealed and therefore, the effect would be to discourage resort to such a remedy. But the chilling effect of the statute upon the author would remain.

This case furnishes an excellent illustration. Zwickler had previously been arrested and prosecuted through the New York courts, all the way to the New York Court of Appeals. To put it mildly, he became chilled in his enthusiasm about future distribution. A reading of the

leaflet (R. 5-6) may raise a question whether it is libelous. It is certainly protected by the *New York Times* case because it concerns itself with the functioning of a Congressman in the performance of his public duties. Whether it can be said to be a "malicious" publication raises several serious questions, and since "malice" is so subjective (akin to "obscene"), the problems multiply. (See the concurring opinions of Justice Black and Justice Goldberg in the *New York Times* case as to the inherent difficulty of assessing "malice" of a publication.) Whose malice is involved? Is it that of the anonymous author or of Zwickler, the distributor? Assuming the author had malice, but Zwickler was innocent and public-spirited, may the leaflet be distributed anonymously? How can Zwickler know, *in advance* of distribution whether he is qualified —or that the publication is qualified? Under the circumstances, what is Zwickler to do about ascertaining his right to distribute anonymously? The answer is quite clear: he is discouraged and will not take the chance of distribution, save that the statute be stricken.

Zwickler's case undoubtedly is also the case of many others. There cannot be freedom to distribute if it is accompanied with fear. Therefore, neither he nor the courts should concern themselves with the question whether the publication is true or false as a price for publication anonymously. Removal of the hazard of distribution is indispensable to freedom of the press.

Up to this point, in arguing on the materiality of the truth or falsity of a statement in relation to anonymity, we have necessarily dealt with those parts of the statute where libel may be a factor. But the statute also speaks about statements or information concerning any "proposition or amendment to the state constitution". As to these, the question of libel cannot apply. But falsity of a statement or information would fall under the statute. We

submit the *Times Inc.* v. *Hill* case is a complete answer: that utterances cannot be penalized or restrained because they may be inaccurate or false.

II

The District Court should have retained jurisdiction and disposed of the constitutional issue.

Over the dissent of Judge Rosling (R. 39), the District Court ordered the complaint dismissed, because it decided to abstain from determining the important constitutional issue raised by appellant. Judge Rosling protested that in the light of the decisions of this court, the statute is void on its face as a restraint on expression, and is at least void for overbreadth. Therefore, he protested the district court should have passed on the constitutional question, as the decision of this court in *Baggett* v. *Bullitt,* 377 U. S. 360, and *Dombrowski* v. *Pfister,* 380 U. S. 479, have announced. He found no basis for sending the case back to the state court for adjudication while the district court abstained.

Noteworthy is the abstention of the majority in that it did not hold the case pending adjudication by the state courts, as true abstention means. Rather it dismissed the complaint. From the opinions of the majority it may be gleaned that the reasons for its decision are (1) that a remedy for the same relief may be found in the New York courts and (2) that there was no showing of violence threatened to Zwickler. Neither of these reasons can find support in the decisions of this court. They are refuted by *Baggett* and *Dombrowski.*

If the reasoning of the District Court in this case was correct, then the most recent case of *Keyishian* v. *Board of Regents,* 385 U. S. 589, should have been dismissed. In that case, a three-judge district court was convened to hear a

complaint seeking a declaratory judgment and injunctive relief against a state statute which required removal of teachers for seditious utterances. Yet, that case, involving claims as does the present one under the First Amendment, was passed upon without abstention.

Were the disposition of the majority in the district court in Zwickler's case given approval, then it would follow that any complaint in the federal court under the First Amendment which seeks a declaratory judgment and injunction against the claimed unconstitutionality of a New York statute should be dismissed, because New York courts provide a remedy in such cases.

Should Zwickler be relegated to the state court for relief by way of an action for a declaratory judgment, as suggested by the majority (in order to escape the perils of martyrdom), he would be in the same posture as in a district court. Under New York law, the remedy of declaratory judgment is a discretionary one (*Delaware Lackawanna Railroad Co.* v. *Slocum*, 299 N. Y. 496, 505, holding that the remedy is discretionary and the New York Court of Appeals will not review the exercise of discretion; also, *Newburger* v. *Lubell*, 257 N. Y. 383, *Bareham* v. *Rochester*, 246 N. Y. 140). The exercise of equitable jurisdiction by a district court is likewise discretionary.

This court, however, at least in First Amendment cases, has upheld the right of resort to the federal courts for an adjudication of the repugnancy of a state statute to the Constitution (otherwise, what purpose can be served by 28 U.S.C. 2281, which requires that a three-judge court must be convened in such cases!)

This court in *Freedman* v. *Maryland*, 380 U. S. 51, revealed its impatience with statutes that *delay* and thus inhibit the exercise of First Amendment rights. It is evident that delay in the exercise of those freedoms is often their destruction. In stating this we are reminded of *Ellis*

v. *Dixon,* 349 U. S. 458, where the delay through state litigation to this court and back again through state courts, although pursued with great diligence extended over many years. Ellis, who sought to have a meeting about the Korean war, found to his dismay, that the subject of the speech had passed into history.

Although the delays and frustrations in pursuing First Amendment freedoms are fraught with exacerbations, as Justice Reed pointed out in *Poulos* v. *New Hampshire,* 345 U. S. 395, nevertheless such a condition need not be accepted fatalistically. *Freedman* has demonstrated that delay may be eliminated, and that means may be devised wherever possible toward that end.

Were Zwickler restricted to learn his constitutional rights only after he risked prosecution in the state courts, the criminal trial, intermediate appeal and appeal to the state's highest court, if allowed, would surely delay the exercise of his right and defeat the intent of this court to preserve the right.

Zwickler should not be required to be martyr to seek relief only after a conviction. Under this statute, it will be recalled, a second conviction for handing out a leaflet is a felony. The seriousness of the restraint as well as the need for pre-arrest relief cannot be minimized. The district court realized this, when it held that the court had jurisdiction because a case and controversy exists: "It alleges a case or controversy which is within the adjudicatory power of this court" (R. 23). *Evers* v. *Dwyer,* 358 U. S. 202. See also, *Speiser* v. *Randall,* 357 U. S. 513; *Keyishian* v. *Board of Regents,* 385 U. S. 589.

Indeed, Zwickler's plight is no different in kind or degree from that of Evers in *Evers* v. *Dwyer,* 358 U. S. 202, where this court on squarely similar facts held that there was a case and controversy. Evers, it will be recalled, attempted to sit in any seat in a segregated bus. Upon his

refusal to sit in a seat designated for black persons, he was told to comply with the municipal ordinance or meet the penalties of non-compliance. Rather than comply, he left the bus and instituted an action to declare the ordinance invalid. This court expressly held that a controversy existed. Zwickler is in every respect in a similar controversy. Zwickler was prosecuted under the statute; the statute was held constitutional; and he was convicted. He seeks to distribute the anonymous pamphlet not only during the elections of 1966, but at subsequent events. He is afraid to do so, because of what had happened to him. In his case, he is not merely chilled in the exercise of his rights. He is frozen. He cannot function because of his anxieties. He did not make distribution immediately prior to the 1966 election because of fear of the existing statute. He also fears to make distribution in the future. Unless he gets protection by this litigation, he will *not* exercise his First Amendment rights. The statute thus inhibits presently and immediately with the exercise of those rights.

Moreover, it should be noted, Zwickler has greater reason to be apprehensive than Evers. Zwickler, as distinct from Evers, was actually prosecuted and had an opinion from the trial court that the law is constitutional. Zwickler, as distinct from Evers, had the district attorney pursue him by the People's appeal to the New York Court of Appeals.

As to any contention that this case is now moot because the 1966 election passed during this litigation (a confirmation of the observations above made on the delays in exercising First Amendment rights), the complaint as well as the District Court show that Zwickler is not seeking to enforce his First Amendment rights only with respect to the election of 1966, but "subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign. Such distribution is in-

tended to be made in quantities of more than a thousand copies of such anonymous leaflet" (Complaint, par. "Fourteenth" (R. 3) and Opinion (R. 20.) It could not be seriously contended that Zwickler should be required to institute an action before each intended distribution. All of which emphasizes that it is necessary that relief be afforded in this case, because the attrition of litigation presupposes the passage of time.

The District Court should have afforded relief in accordance with this court's admonitions in *Dombrowski.* In that case an action was brought in a district court for a declaratory judgment and injunction against a state statute which it was claimed violated First Amendment protections. It should be noted that in *Dombrowski* a factor existed *which does not exist here,* that prosecution had been begun in a state court and the action sought to enjoin it, what with 28 U.S.C. Section 2283 and *Stefinelli* v. *Minard,* 342 U. S. 117, standing to thwart such a remedy. Yet despite those obstacles, this court held that Dombrowski's action was warranted. Said this court:

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, e.g., Smith v. California, 361 U. S. 147, 4 L. ed 2d 205, 80 S. Ct. 215. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See Baggett v. Bullitt, supra, 377 U. S. at 379, 12 L. ed 2d at 389. For '(t)he threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . .' NAACP v. Button,

371 U. S. 415, 433, 9 L. ed 2d 405, 418, 83 S. Ct. 328. Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendant value to all society, and not merely to those exercising their rights—might be the loser. Cf. Garrison v. Louisiana, 379 U. S. 64, 74-75, 13 L. ed 2d 125, 132, 133, 85 S. Ct. 209. For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. Thornhill v. Alabama, 310 U. S. 88, 97-98, 84 L. ed 1093, 1099, 1100, 60 S. Ct. 736; NAACP v. Button, supra, 371 U. S. at 432-433, 9 L. ed 2d at 417, 418; cf. Aptheker v. Secretary of State, 378 U. S. 500, 515-517, 9 L. ed 2d 992, 1002, 1003, 84 S. Ct. 1659; United States v. Raines, 362 U. S. 17, 21-22, 4 L. ed 2d 524, 529, 80 S. Ct. 519. We have fashioned this exception to the usual rules governing standing, see United States v. Raines, supra, because of the '. . . danger of tolerating, in the area of First Amendment freedoms, the existence of a panel statute susceptible of sweeping and improper application.' NAACP v. Button, supra, 371 U. S. at 433, 9 L. ed 2d at 418. If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardly enough to risk criminal prosecution to determine the proper scope of regulation. Cf. Ex parte Young, supra, 209 U. S. at 147-148, 52 L. ed at 723, 724. By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not

thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure. See NAACP v. Button, supra, 371 U. S. at 432-433, 9 L. ed 2d at 417, 418; cf. Baggett v. Bullitt, supra, 377 U. S. at 378-379, 12 L. ed 2d at 389; Bush v. New Orleans School Board, 194 F Supp 182, 185, affirmed sub nominibus Tugwell v. Bush, 367 U. S. 907, 6 L. ed 2d 1250; 81 S. Ct. 1926, Gremillion v. Bush, 368 U. S. 11, 7 L. ed 2d 75, 82 S. Ct. 119."

Although *Dombrowski* held that it was improper for a district court to abstain when a statute is attacked on its face as abridging free expression, nevertheless, the District Court here felt that *Dombrowski* did not apply because the key to *Dombrowski* was the showing of violence. We believe this is a mistaken view of *Dombrowski,* as Judge Rosling asserted in dissent. There was no violence in *Baggett* or in *Keyishian.* Yet relief in the federal courts was afforded in those cases merely by a claim that the statute attacked was repugnant to the protections of the First Amendment. See also, *Cameron* v. *Johnson,* 381 U. S. 741; *Reed Enterprises* v. *Corcoran,* C.A.D. of C. December 2, 1965, 354 Fed. 2d 519; *Interstate Circuit, Inc.* v. *City of Dallas,* No. 978, October Term, 1966; *Carr* v. *Baker,* 369 U. S. 186, *Chelton* v. *Tucker; Davidowitz* v. *Hines,* 312 U. S. 52; *Dombrowski* v. *Pfister:* Federal Injunctions Against State Prosecutions in Civil Rights Cases—A New Trend in Federal-State Relations, 34 Fordham Law Review 71.

With respect to *Douglas* v. *City of Jeannette,* 319 U. S. 157, upon which the District Court relied: Although *Dombrowski* has minimized its force, it seems that in discussions of that case there has been an oversight of the fact that what has been quoted from it is *dicta.* That case stands for the proposition—and we follow the rule that a

case stands for what it decides—that because equity does not perform a useless task, relief will not be granted under circumstances of futility. In that case, on the very day it was decided, this court in *Murdock* v. *Commonwealth of Pennsylvania,* 319 U. S. 105, held unconstitutional, the very same ordinance involved in the *Douglas* case. This court therefore said (p. 165) "in view of the decision rendered today in *Murdock, et al.* v. *Pennsylvania, supra,* we find no ground for supposing that the intervention of a federal court, in order to secure petitioner's constitutional rights, will be either necessary or appropriate". Under the circumstances we respectfully urge that the *Douglas* case is neither apposite or authority in a case such as the instant one, where the invalidation of a statute is sought for the first time.

If it be a prerequisite for the exercise of jurisdiction, that it first be demonstrated that the statute infringes First Amendment rights, then the appellant has complied, because we have argued, we believe persuasively, that the statute even if construed to apply to obnoxious literature is unconstitutional and that a remedy, if any, lies against the substantive act, rather than against the anonymity of the publication.

In the text of this discussion we offer this commentary: when it is said that it must first be shown that a statute is invalid on its face, in order to be eligible for the exercise of jurisdiction, a perplexing anomaly is stated. Actually, the requirement puts the car before the horse. It in effect means that a court will not entertain a case unless it be first shown to the court conclusively that the statute is invalid. A court thus will decide whether to accept the case for decision only after it has already decided the merits of the case. To overcome this incongruity, is it not better if the rule be stated (as we gather from *Baggett, Dombrowski* and *Keyishian*): that whenever a state statute is attacked on its face as abridging free

speech that a district court is required to exercise jurisdiction? Compare *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 328, where the right to deliver liquor at an airport was adjudicated by a three-judge court upon a claim of the repugnance of a state statute.

We augment our argument of the needs of an expeditious remedy in the federal courts of declaratory judgment and injunction, by the very recent decision of this court on June 12, 1967 in *Jacobs* v. *New York*, —— U. S. ——, 18 L. ed. 1294. There, this court dismissed an appeal from a judgment of conviction because the time in which the sentence could be executed, had expired. As Chief Justice Warren and Justice Douglas pointed out, that decision is a serious blow to free-speech appeals, for very few can work their way through the state courts in time to be reviewed by this court. And Justice Douglas was prophetic: "If a practice such as this were shown to exist, its *in terrorem* effect on all publishers would certainly be sufficiently clear as to give any of them standing to bring an action for declaratory relief." And since it is so important in speech cases that there be a speedy determination lest speech be defeated, only the expeditious remedy of a three-judge court with a direct appeal to this court will give insurance against *in terrorem* statutes that are attacked on their face as abridgements of speech.

It can readily be discerned that relegating Zwickler (as the appellee has urged below) to a remedy only after another conviction for his offense would enmesh him beyond ability to have this court pass on the validity of the statute that stands in his way to the freedom of expression. And it is worthy to repeat, that a second conviction under the statute is a felony, with its attendant disabilities.

III

The judgment in this case should be a final one.

At the hearing before the three-judge court, counsel had stipulated that the hearing be treated as one for a final judgment, no questions of fact being in dispute (R. 17-18). Inadvertently, the decision of the District Court (R. 31) did not conform to the stipulation; and the order likewise did not correspond (R. 34). Under the circumstances, the stipulation should prevail, and be considered by the court in disposing of this appeal.

Conclusion

This court has become wary of attempts to delay the exercise of First Amendment rights. By the decision of the District Court, Zwickler has been whipsawed between the state courts and the federal courts. Zwickler was pursued by prosecution through all state courts. He then turned to the federal courts for relief. The federal court agreed it had jurisdiction to grant him relief. But it refused to grant it, and told him to go back again to the state courts for relief. Such a state of affairs, especially in an important First Amendment challenge, does not comport with this court's concept of an expeditious handling of free-speech cases.

For the reasons stated, it is respectfully submitted that the order of the court below should be reversed and that this court, itself, should grant the relief appellant seeks.

August 16, 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 29

SANFORD ZWICKLER,

Appellant,

—v.—

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF *AMICUS CURIAE* OF NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF *AMICUS CURIAE* OF NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Interest of *Amicus*

Amicus is a New York corporation organized for the purpose, among other things, of securing equality before the law, without regard to race, for all citizens. In this connection, *amicus'* staff attorneys often have represented citizens before various courts, including this Court, on claims that they have been denied equal protection of the laws, due process of law, and other rights secured by the Constitution and laws of the United States. Moreover,

its attorneys have represented citizens who have been denied First Amendment rights while attempting to secure equal treatment before the law without regard to race.

In *Strother* v. *Thompson*, 372 F. 2d 654 (5th Cir. 1967), *amicus'* attorneys represented civil rights workers prosecuted under a Jackson, Mississippi municipal ordinance restricting the distribution of handbills in that city. Having had experience with the pains, perils and prolongations of litigation in the state courts—litigation which in the Jackson Freedom Rider cases alone required delay of four years and expenditure of many thousands of dollars before the vindication of precious constitutional rights in this Court, *Thomas* v. *Mississippi*, 380 U. S. 524 (1965)—*amicus'* attorneys sought and obtained pretrial federal declaratory and injunctive relief against the handbill prosecutions.

Because of the broad significance of this case, which may not adequately appear in argument on behalf of the parties, amicus respectfully submits that its views may be of interest to the Court.

Argument

Amicus submits that the state statute challenged by this suit[1] is on its face offensive to the First and Fourteenth Amendments to the Constitution of the United States and that the court below erred in refusing to so hold.

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[1] Section 781-b of the New York Penal Law, McKinney's Consol. Laws, c. 40.

I.

The State Statute Challenged by This Suit Is Vague, Overbroad and Susceptible of Sweeping and Improper Application Trenching Upon Rights of Free Expression.

Appellant unsuccessfully sought below injunctive and declaratory relief against Section 781-b of the New York Penal Law. That statute makes it a crime, among other things, to distribute "in quantity" any anonymous literature concerning any person "in connection with" any election. The court below, one judge dissenting, took no position on the validity of the statute. However, it is plain that §781-b cannot stand consistently with *Talley* v. *California,* 362 U. S. 60 (1960), and *Mills* v. *Alabama,* 384 U. S. 214 (1966).

In *Talley,* the Court invalidated a municipal ordinance making it a crime to distribute anonymous handbills "under any circumstances." The Court reserved the question whether a more limited ordinance—"limited [so as] to prevent [fraud, false advertising, libel] or any other supposed evils" (362 U. S. at 64)—could pass constitutional muster.

The New York statute purports to be more limited than the *Talley* ordinance in two ways. It proscribes distribution of anonymous literature only if the literature is: (1) "in quantity"; and (2) "in connection with" any election. These "limitations" only serve to incorporate impermissible vagueness into the statute and do not cure its overbreadth. As the court below noted (261 F. Supp. at 988), the phrase "in quantity" is not defined. Nor, *amicus* adds, is there a definition of the phrase "in connection with"

any election. The public is required to play "guessing games" (see 261 F. Supp. at 988) as to how proximate in time and content to an election a handbill must be to meet the statutory standard.

But even if §781-b were more limited than the *Talley* ordinance, it would still not be limited enough to meet First Amendment objections.

In *Mills* v. *Alabama*, 384 U. S. 214 (1966), this Court invalidated a state statute which made it a crime to solicit any votes on election day in support of or in opposition to any proposition being voted on that day. The state sought to justify the statute on the ground that its limitation as to time (only one day) and content (only "electioneering") made it reasonable. But the Court rejected this defense, holding (384 U. S. at 220):

> We hold that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election.[2]

Amicus submits that §781-b cannot escape invalidation under the First Amendment when it makes it a crime for a person to do no more than distribute "in quantity" anonymous handbills "in connection with" a publicly held election.

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[2] The fact that *Mills* involved newspaper publishing rather than handbill distribution has no constitutional significance (384 U. S. at 219):

> The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, see *Lovell* v. *Griffin*, 303 U. S. 444, 82 L. ed. 949, 58 S. Ct. 666, to play an important role in the discussion of public affairs.

II.

The Court Below Erred in Abstaining.

The court below, by abstaining, put itself in conflict with several prior decisions of this Court. The court held that appellant should first seek declaratory relief in an appropriate state court (261 F. Supp. at 993). However, in *Anderson* v. *Martin*, 375 U. S. 399 (1964), reversing 206 F. Supp. 700 (E. D. La. 1962) (three-judge court), also a federal suit seeking to restrain the enforcement of a state statute regulating the electoral process, this Court authorized federal injunctive relief. No suggestion was made either in this Court or below that such relief should first have been sought in the appropriate state court, although Louisiana,[3] like New York,[4] has a declaratory judgment procedure. Such a suggestion was, however, made in *Gayle* v. *Browder*, 142 F. Supp. 707 (M. D. Ala. 1956) (three-judge court), *affirmed per curiam*, 352 U. S. 903 (1956), and firmly rejected (142 F. Supp. at 713):

> The short answer is that [comity] has no application where the plaintiffs complain that they are being deprived of constitutional civil rights, for the protection of which the Federal courts have a responsibility as heavy as that which rests on the State courts.

And in *Dombrowski* v. *Pfister*, 380 U. S. 479, 491 (1965), this Court unambiguously held that when a statute broadly overreaching First Amendment freedoms is challenged in a federal court, the *state* must "assume the burden of obtaining a permissible narrow construction in a noncriminal proceeding."

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[3] See *Dombrowski* v. *Pfister*, 380 U. S. 479, 491, footnote 6 (1965).

[4] See 261 F. Supp. at 993.

The court below also appeared to suggest that appellant's federal suit was premature, since appellant was not threatened with imminent arrest (see 261 F. Supp. at 988).[5] But, as this Court has pointed out, one is not required to risk arrest in order to test the validity of a state statute infringing upon his federal rights, *Evers* v. *Dwyer*, 358 U. S. 202, 204 (1958); *Gayle* v. *Browder*, *supra*. Moreover, this suggestion ignored the practical restraints imposed upon appellant by the statute. Appellant had to guess whether he was within the time perimeter described by "in connection with any election." If he guessed "yes", and the state court disagreed, then it could dismiss his declaratory judgment suit by parity of reasoning with the court below.[6] If he wrongly guessed "no", distributed his handbills and was arrested and charged under §781-b, then a federal court might well hold relief barred by comity or 28 U. S. C. §2283. See *Cameron* v. *Johnson*, 262 F. Supp. 873 (S. D. Miss. 1966) (three-judge court), on remand from 381 U. S. 741 (1965), appeal pending, O. T. 1967, No. 111 Misc.; *Zwicker* v. *Boll*, —— F. Supp. ——, W. D. Wisc., No. 67-C-36, decided June 7, 1967 (three-judge court), appeal pending, O. T. 1967, No. —— Misc. In either event, he would be required to wait until shortly before the election to com-

[5] Notwithstanding appellant had previously been arrested and prosecuted under §781-b, the majority thought that appellant's allegation of future arrest and prosecution for the same acts "presume[d] to read [the prosecutor's] mind" (261 F. Supp. at 988).

[6] Moreover, here, as in *Baggett* v. *Bullitt*, 377 U. S. 360, 378 (1964), "it is difficult to see how an abstract construction of the challenged terms . . . in a declaratory judgment action could eliminate the vagueness from these terms. It is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty. Abstention does not require this."

mence his suit—with the likelihood that the election would come and go before he could obtain a protective judicial ruling vindicating his plain First Amendment rights.

It is true that *Anderson* v. *Martin, Gayle* v. *Browder* and *Evers* v. *Dwyer* were all equal protection cases rather than First Amendment cases. But that fact cannot diminish the propriety or necessity of federal relief. As this Court stated in *Bond* v. *Floyd,* 385 U. S. 116, 131 (1966):

> We are not persuaded by the state's attempt to distinguish, for purposes of our jurisdiction, between [legislative action] alleged to be on racial grounds and [legislative action] alleged to violate the First Amendment.

The fact that this suit seeks the vindication of First Amendment rights should, if anything, make this a *more* compelling case for federal relief. As this Court held in *Dombrowski* v. *Pfister, supra,* 380 U. S. at 486-87:

> A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms . . . When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. *The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases* . . . The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecu-

tion, unaffected by the prospects of its success or failure. (Emphasis added)

Notwithstanding this Court's clear holding, and appellant's express reliance upon it (261 F. Supp. at 988), the court below brushed it aside, saying (261 F. Supp. at 992): "There is no suggestion . . . that the [appellant's] defense to any such prosecution [under §781-b] will not assure him adequate vindication of his alleged constitutional rights."

Unless this Court reasserts the primacy of its doctrine over that of the district court, First Amendment rights will entail only the right to have one's arrest and conviction for constitutionally protected activity overturned some years later[7]—*not* the right to engage in the protected activity itself. First Amendment rights should be the province not only of law professors but of those persons whose criticisms and clamor "the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free", *Mills* v. *Alabama, supra,* 384 U. S. at 219. As long as §781-b deters this socially vital and constitutionally protected activity, abstention defeats rather than serves a healthy federalism.[8]

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[7] And sometimes not even then, see *Jacobs* v. *New York,* —— U. S. ——, 18 L. ed. 2d 1294 (1967); *Tannenbaum* v. *New York,* —— U. S. ——, 18 L. ed. 2d 1300 (1967).

[8] See *Baggett* v. *Bullitt,* 377 U. S. 360, 378-79 (1964):

> We also cannot ignore that abstention operates to require piecemeal adjudication in many courts, *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, thereby delaying ultimate adjudication on the merits for an undue length of time, a result quite costly where the vagueness of a statute may inhibit the exercise of First Amendment freedoms. . . . Remitting these litigants to the state courts . . . would further protract these proceedings, . . . with only the likelihood that the case, perhaps years later, will return to the . . . District Court and perhaps this Court for a decision on the identical issue herein decided.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 29.—October Term, 1967.

Sanford Zwickler, Appellant, v. Aaron E. Koota, as District Attorney of the County of Kings. | On Appeal From the United States District Court for the Eastern District of New York.

[December 5, 1967.]

Mr. Justice Brennan delivered the opinion of the Court.

Section 781–b of the New York Penal Law makes it a crime to distribute in quantity, among other things, any handbill for another which contains any statement concerning any candidate in connection with any election of public officers, without also printing thereon the name and post office address of the printer thereof and of the person at whose instance such handbill is so distributed.[1]

[1] McKinney's N. Y. Laws, Penal Law § 781–b (now superseded in identical language by McKinney's N. Y. Laws, Educational Law § 457, see L. 1965, c. 1031, at 1782–1783):

"No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered

Appellant was convicted of violating the statute by distributing anonymous handbills critical of the record of a United States Congressman seeking re-election at the 1964 elections. The conviction was reversed, on state law grounds, by the New York Supreme Court, Appellate Term,[2] and the New York Court of Appeals affirmed without opinion, 16 N. Y. 2d 1069, 266 N. Y. S. 2d 140, 213 N. E. 2d 467. Thereafter appellant, invoking the District Court's jurisdiction under the Civil Rights Act, 28 U. S. C. § 1343, and the Declaratory Judgment Act, 28 U. S. C. § 2201,[3] sought declaratory and injunctive relief in the District Court for the Eastern District of New

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such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also so printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

"The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal."

[2] "In our opinion, the People failed to establish that defendant distributed anonymous literature 'in quantity' in violation of the provisions of Section 781 (b) [*sic*] of the Penal Law. We do not reach the constitutionality of the statute involved." *People* v. *Zwickler*, Sup. Ct., App. Term, Kings Co., April 23, 1965 (unreported), as quoted in 261 F. Supp., at 987.

[3] Appellee questions the statement of the majority below that "[t]he complaint . . . alleges a case or controversy which is within the adjudicatory power of this court. *Douglas* v. *City of Jeannette*, 319 U. S. 157, 162." 261 F. Supp., at 989. Notwithstanding this statement, we are not persuaded, in light of its decision to abstain, that the majority below considered the prerequisites to a declaratory judgment or that these issues were in fact adjudicated. "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between

York on the ground that, on its face, the statute was repugnant to the guarantees of free expression secured by the Federal Constitution. His contention, below and in this Court, is that the statute suffers from impermissible "overbreadth" in that its sweep embraces anonymous handbills both within and outside the protection of the First Amendment. Cf. *Talley* v. *California*, 362 U. S. 60. A three-judge court, one judge dissenting, applied the doctrine of abstention and dismissed the case,[4] remitting appellant to the New York courts to assert his constitutional challenge in defense of any criminal prosecution for any future violations of the statute or, short of this, to the institution of "an action in the state court for a declaratory judgment." [5] 261 F. Supp. 985, 993. Because appellant's appeal presents an important question of the scope of the discretion of the district courts to abstain from deciding the merits

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parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co.* v. *Pacific Coal and Oil Co.*, 312 U. S. 270, 273. It will be for the District Court on the remand to decide whether appellant's allegations entitle him to a declaratory judgment on the constitutional question.

[4] It is better practice, in a case raising a federal constitutional or statutory claim, to retain jurisdiction, rather than to dismiss, see Note, Federal Question Abstention: Justice Frankfurter's Doctrine in an Activist Era, 80 Harv. L. Rev. 604 (1967), but other courts have also ordered dismissal. Compare *Government & Civic Employees Organizing Committee, CIO* v. *Windsor*, 353 U. S. 364; *Shipman* v. *DuPre*, 339 U. S. 321, with *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368; *Local 333B, United Marine Div., Int'l Longshoremen's Assn.* v. *Battle*, 101 F. Supp. 650 (D. C. E. D. Va.), aff'd mem., 342 U. S. 880. See generally Note, Judicial Abstention From the Exercise of Federal Jurisdiction, 59 Col. L. Rev. 749, 772–774 (1959).

[5] New York provides a Declaratory Judgment remedy, N. Y. CPLR § 3001. See *De Veau* v. *Braisted*, 5 App. Div. 2d 603, 174 N. Y. S. 2d 596 (2d Dept.), aff'd, 5 N. Y. 2d 236, 183 N. Y. S. 2d 793, 157 N. E. 2d 165, aff'd, 363 U. S. 144.

of a challenge that a state statute on its face violates the Federal Constitution, we noted probable jurisdiction. 386 U. S. 906. We reverse.

We shall consider *first* whether abstention from the declaratory judgment sought by appellant would have been appropriate in the absence of his request for injunctive relief, and *second*, if not, whether abstention was nevertheless justified because appellant also sought an injunction against future criminal prosecutions for violation of § 781–b.

I.

During most of the Nation's first century, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws. The only exception was the 25th section of the Judiciary Act of 1789 providing for review in this Court when a claim of federal right was denied by a state court.[6] But that policy was completely altered after the Civil War when nationalism dominated political thought[7] and brought

[6] Thus Congress did not exercise the grant under Art. III, § 2, cl. 1, of the Constitution: "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority. . . ." Original "arising under" jurisdiction was vested in the federal courts by § 11 of the Act of February 13, 1801, c. 4, 2 Stat. 92, but it was repealed only a year later by § 1 of the Act of March 8, 1802, c. 8, 2 Stat. 132. An earlier version of the Judiciary Act of 1789, which died in committee, provided for jurisdiction in the federal courts "'*of all cases of federal jurisdiction, whether in law or equity* above the value of five hundred dollars' . . . ." Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 61 (1923). See generally Frankfurter & Landis, The Business of the Supreme Court: A Study in the Federal Judicial System, c. 1.

[7] "The history of the federal courts is woven into the history of the times. The factors in our national life which came in with reconstruction are the same factors which increased the business of the federal courts, enlarged their jurisdiction, modified and expanded

with it congressional investiture of the federal judiciary with enormously increased powers. The Act of March 3, 1875,[8] was the principal ". . . measure of the broadening federal domain in the area of individual rights," *McNeese* v. *Board of Education*, 373 U. S. 668, 673. By that statute ". . . Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts ceased to be restric-

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their structure." Frankfurter & Landis, *supra*, at 59; see also Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L. Q. 499, 507–511 (1928).

[8] The statute granted the district courts "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or shall be made, under their authority. . . ." Act of March 3, 1875, § 1, 18 Stat. 470. See generally Hart & Wechsler, The Federal Courts and the Federal System 727–733; Wright, Federal Courts § 17; Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639 (1942); Forrester, Federal Question Jurisdiction & Section 5, 18 Tulane L. Rev. 263 (1943); Forrester, The Nature of a "Federal Question," 16 Tulane L. Rev. 362 (1942); Mishkin, The Federal "Question" in the District Courts, 53 Col. L. Rev. 157 (1953).

"This development in the federal judiciary, which in the retrospect seems revolutionary, received hardly a contemporary comment." Frankfurter & Landis, *supra*, at 65. While there is practically no legislative history of the Act, see *id.*, at 65–69, for a summary of what history is available, commentators are generally agreed that a broad grant of jurisdiction was intended. See, *e. g.*, Forrester, The Nature of a "Federal Question," 16 Tulane L. Rev. 362, 374–385 (1942); Mishkin, The Federal "Question" in the District Courts, 53 Col. L. Rev. 157, 160 (1953). This is not to say that this Court has read the congressional grant of power in the Act of 1875 as equated with the potential for federal jurisdiction found in Article III of the Constitution. See, *e. g.*, *National Mut. Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582, 613–615 (opinion of Rutledge, J.); *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505.

tive tribunals of fair dealing between citizens of different states and became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." (Emphasis added.) Frankfurter and Landis, *supra*, at 65. Indeed, even before the 1875 Act, Congress in the Civil Rights Act of 1871,[9] subjected to suit, "Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights . . . secured by the Constitution and laws . . . ." 42 U. S. C. § 1983; and gave the district courts "original jurisdiction" of actions "[t]o redress the deprivation, under color of any state law . . . of any right . . . secured by the Constitution . . . ." 28 U. S. C. § 1343 (3).

In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, ". . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ," *Robb* v. *Connally*, 111 U. S. 624, 637. "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other

[9] Five Civil Rights Acts were passed between 1866 and 1875. See 14 Stat. 27 (1866), 16 Stat. 140 (1870), 16 Stat. 433 (1871), 17 Stat. 13 (1871), 18 Stat. 335 (1875). Only § 1 of the Act of April 20, 1871, 17 Stat. 13, presently codified as 42 U. S. C. § 1983, achieved measurable success in later years. See generally Note, The Civil Rights Act of 1871: Continuing Vitality, 40 Notre Dame Law. 70 (1964).

forum." *Stapleton* v. *Mitchell*, 60 F. Supp. 51, 55; see *McNeese* v. *Board of Education*, 373 U. S., at 674, n. 6. Cf. *Cohens* v. *Virginia*, 6 Wheat. 264, 404. The judge-made doctrine of abstention, first fashioned in 1941 in *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, sanctions such escape only in narrowly limited "special circumstances." *Propper* v. *Clark*, 337 U. S. 472, 492.[10] One of the "special circumstances"—that thought by the District Court to be present in this case—is the susceptibility of a state statute to a construction by the state courts that would avoid or modify the constitutional question. *Harrison* v. *NAACP*, 360 U. S. 167. Compare *Baggett* v. *Bullitt*, 377 U. S. 360.[11]

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[10] See, *e. g.*, *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639; *Government and Civic Employees Organizing Comm., CIO* v. *Windsor*, 353 U. S. 364; *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220; *Albertson* v. *Millard*, 345 U. S. 242; *Shipman* v. *DuPre*, 339 U. S. 321; *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368; *American Federation of Labor* v. *Watson*, 327 U. S. 582; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101; *City of Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168. See generally Wright, The Abstention Doctrine Reconsidered, 37 Tex. L. Rev. 815 (1959); Note, Judicial Abstention From the Exercise of Federal Jurisdiction; 59 Col. L. Rev. 749 (1959); Note, Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era, 80 Harv. L. Rev. 604 (1967); Note, Doctrine of Abstention: Need of Reappraisal, 40 Notre Dame Law. 101 (1964). Even when parties are sent to state court for clarification of state law, the federal question may be reserved for decision by the district court. *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411.

[11] Other "special circumstances" have been found in diversity cases, see, *e. g.*, *Clay* v. *Sun Insurance Ltd.*, 363 U. S. 207; *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25; *Meredith* v. *Winter Haven*, 320 U. S. 228; but see *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185; cf. Note, Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals," 73 Yale L. J. 850, and cases cited therein; and in cases involving possible disruption of complex state administrative processes, see,

But we have here no question of a construction of § 781–b that would "avoid or modify the constitutional question." Appellant's challenge is not that the statute is void for "vagueness," that is, that it is a statute "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391.[12] Rather his constitutional attack is that the statute, although lacking neither clarity nor precision, is void for "overbreadth," that is, that it offends the constitutional principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*, 377 U. S. 288, 307. See *Aptheker* v. *Secretary of State*, 378 U. S. 500, 508–509; *NAACP* v. *Button*, 371 U. S. 415, 438; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293; *Shelton* v. *Tucker*, 364 U. S. 479, 488; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 246; *Martin* v. *City of Struthers*, 319 U. S. 141, 146–149; *Cantwell* v. *Connecticut*, 310 U. S. 296, 304–

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e. g., *Alabama Public Serv. Comm'n* v. *Southern R. Co.*, 341 U. S. 341; *Burford* v. *Sun Oil Co.*, 319 U. S. 315; cf. *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185; *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25. See generally Wright, Federal Courts § 52; Note, 59 Col. L. Rev., *supra*, at 757–762.

[12] A lower court held "void for indefiniteness" a predecessor statute of § 781–b. *People* v. *Clampitt*, 34 Misc. 2d 766, 222 N. Y. S. 2d 23 (Ct. Spec. Sess., N. Y. City, 1961). Thereupon the legislature amended the statute to its present form, providing that an offense could not be made out under it until whatever literature might be "printed" or "reproduced" might also be "distributed." The constitutionality of the amended statute has not been determined in the New York Courts.

307; *Schneider* v. *State*, 308 U. S. 147, 161, 165.[13] Appellee does not contest appellant's suggestion that § 781–b is both clear and precise; indeed, appellee concedes that state court construction cannot narrow its allegedly indiscriminate cast and render unnecessary a decision of appellant's constitutional challenge. See *Aptheker* v. *Secretary of State*, 378 U. S. 500.

The analysis in *United States* v. *Livingston*, 179 F. Supp. 9, 12–13, affirmed, *Livingston* v. *United States*, 364 U. S. 281, is the guide to decision here:

> "Regard for the interest and sovereignty of the state and reluctance needlessly to adjudicate constitutional issues may require a federal District Court to abstain from adjudication if the parties may avail themselves of an appropriate procedure to obtain state interpretation of state laws requiring construction. *Harrison* v. *N. A. A. C. P.*, 360 U. S. 167. The decision in *Harrison*, however, is not a broad encyclical commanding automatic remission to the state courts of all federal constitutional questions arising in the application of state statutes. *NAACP* v. *Bennett*, 360 U. S. 471. Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit."

In *Turner* v. *City of Memphis*, 369 U. S. 350 (*per curiam*), we vacated an abstention order which had been granted on the sole ground that a declaratory judgment

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[13] For the different constitutional considerations involved in attacks for "vagueness" and for "overbreadth" see *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603–604, 608–610.

action ought to have been brought in the state court before the federal court should be called upon to consider the constitutionality of a statute alleged to be violative of the Fourteenth Amendment. In *McNeese* v. *Board of Education*, 373 U. S. 668, we again emphasized that abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim.[14] After examining the purposes of the Civil Rights Act, under which that action was brought, we concluded that "[w]e would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." 373 U. S., at 672. For the "recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 415–416.

These principles have particular significance when, as in this case, the attack upon the statute on its face is for repugnancy to the First Amendment. In such case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect. See *Dombrowski* v. *Pfister*, 380 U. S. 479, 486–487; *Baggett* v. *Bullitt*, *supra*, at 378–379; *NAACP* v. *Button*, *supra*, at 433; cf. *Garrison*

[14] We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible to a limiting construction. *Harman* v. *Forssenius*, 380 U. S. 528, 534; *Davis* v. *Mann*, 377 U. S. 678, 690; *Baggett* v. *Bullitt*, 377 U. S. 360, 375–379; *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 415–416; *McNeese* v. *Board of Education*, 373 U. S. 668, 673, 674; *NAACP* v. *Bennett*, 360 U. S. 471; *City of Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 84; *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101, 105; Note, 80 Harv. L. Rev., *supra*, at 605; Note, 40 Notre Dame Law., *supra*, at 102.

v. *Louisiana*, 379 U. S. 64, 74–75; *Smith* v. *California*, 361 U. S. 147.

It follows that unless appellant's addition of a prayer for injunctive relief supplies one, no "special circumstance" prerequisite to application of the doctrine of abstention is present here, *Baggett* v. *Bullitt*, 377 U. S. 360, 375–379, and it was error to refuse to pass on appellant's claim for a declaratory judgment.[15]

II.

In support of his prayer for an injunction against further prosecutions for violation of § 781–b, appellant's amended complaint alleges that he desires to continue to distribute anonymous handbills in quantity "in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966." [16] He further alleges that "[b]ecause of the previous prosecution of plaintiff for making the distribution of the leaflet . . . plaintiff is in fear of exercising his right to make distribution as aforesaid and is in danger of again being prosecuted therefor, unless his right of expression is declared by this court, without submitting himself to the penalties of the statute."

The majority below was of the view that, in light of this prayer, abstention from issuing a declaratory judgment was justified because appellant had made no show-

[15] Of course appellant must establish the elements governing the issuance of a declaratory judgment. See n. 3, *supra*.

[16] Appellant urges that these allegations refute appellee's suggestion in his Motion to Dismiss that "[s]ince the political literature appellant intended to distribute all related to the 1966 congressional candidacy of Abraham Multer . . . , this matter might be properly dismissed for mootness." This dispute will be part of the issues to be decided by the District Court on the remand. See n. 3, *supra*. Multer has since been elected to the Supreme Court of New York and will take office on January 1, 1968. New York Times, p. 31, col. 2, November 8, 1967.

ing of "special circumstances" entitling him to an injunction against criminal prosecution. Appellee supports this holding by reliance upon the maxim that a federal district court should be slow to act "where its powers are invoked to interfere by injunction with threatened criminal prosecutions in a state court." *Douglas* v. *City of Jeannette*, 319 U. S. 157, 162. We have recently recognized the continuing validity of that pronouncement. *Dombrowski* v. *Pfister*, 380 U. S. 479, 483–485. However, appellant here did not, as did the plaintiffs in *Douglas*, 319 U. S., at 159, seek solely to "restrain threatened criminal prosecution of [him] in the state courts . . . ." Rather, he also requested a declaratory judgment that the state statute underlying the apprehended criminal prosecution was unconstitutional.

The majority below, although recognizing that *Douglas* might be inapposite to this case, 261 F. Supp., at 990, read *Dombrowski* v. *Pfister* as requiring abstention from considering appellant's request for a declaratory judgment in the absence of a showing by appellant of "special circumstances to justify the exercise of federal court jurisdiction . . ." to grant injunctive relief. 261 F. Supp., at 991. Since the majority found no "special circumstances" justifying that relief, the majority concluded that it was also required to abstain from considering the request for declaratory relief.

This conclusion was error. *Dombrowski* teaches that the questions of abstention and of injunctive relief are not the same.[17] The question of the propriety of the action of the District Court in abstaining was discussed as an independent issue governed by different considerations. We squarely held that "the abstention doctrine

[17] Our discussion of the issue of injunctive relief in *Dombrowski* is at 380 U. S. 483–489, and our discussion of the issue of abstention is at 489–492.

is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression . . . ." 380 U. S., at 489–490. This view was reaffirmed in *Keyishian* v. *Board of Regents*, 385 U. S. 589, 601, n. 9, when a statute was attacked as unconstitutional on its face and we said, citing *Dombrowski* and *Baggett* v. *Bullitt*, *supra*, "[t]his is not a case where abstention pending state court interpretation would be appropriate . . . ."

It follows that the District Court's views on the question of injunctive relief are irrelevant to the question of abstention here. For a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute. We hold that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction. *Douglas* v. *City of Jeannette*, *supra*, is not contrary. That case involved only the request for injunctive relief. The Court refused to enjoin prosecution under an ordinance declared unconstitutional the same day in *Murdock* v. *Pennsylvania*, 319 U. S. 105. Comity between the federal and Pennsylvania courts was deemed sufficient reason to justify the holding that "in view of the decision rendered today in *Murdock* . . . we find no ground for supposing that the intervention of a federal court, in order to secure petitioners' constitutional rights, will be either necessary or appropriate." 319 U. S., at 165. It will be the task of the District Court on the remand to decide whether an injunction will be "necessary or appropriate" should appellant's prayer for declaratory relief prevail. We express no view whatever with

respect to the appropriateness of declaratory relief in the circumstances of this case or the constitutional validity of the law.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 29.—October Term, 1967.

Sanford Zwickler, Appellant, *v.* Aaron E. Koota, as District Attorney of the County of Kings.	On Appeal From the United States District Court for the Eastern District of New York.

[December 5, 1967.]

Mr. Justice Harlan, concurring in the result.

I agree that, in the circumstances of this case, the District Court should not have declined to adjudicate appellant's constitutional claims. I am, however, constrained by my uncertainty as to the implications of certain portions of the Court's opinion to state my views separately.

This Court has repeatedly indicated that "abstention" is appropriate "where the order to the parties to repair to the state court would clearly serve one of two important countervailing interests: either the avoidance of a premature and perhaps unnecessary decision of a serious federal constitutional question, or the avoidance of the hazard of unsettling some delicate balance in the area of federal-state relationships." *Louisiana P. & L. Co.* v. *Thibodaux City*, 360 U. S. 25, 32 (dissenting opinion). See generally *Harrison v. NAACP*, 360 U. S. 167; *Allegheny County* v. *Mashuda Co.*, 360 U. S. 185, 188–189. The first of these interests has been found in cases in which the federal constitutional issue might be mooted or "presented in a different posture" [1] by a state court determination of pertinent state law. See, *e. g.*, *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101; *Alabama State Federation*

[1] *Allegheny County* v. *Mashuda Co.*, *supra*, at 189.

of Labor v. *McAdory*, 325 U. S. 450. The second of these interests has been found, for example, in situations in which the exercise of jurisdiction by a federal court would disrupt a state administrative process, *Burford* v. *Sun Oil Co.*, 319 U. S. 315; interfere with the collection of state taxes, *Toomer* v. *Witsell*, 334 U. S. 385, 392; or otherwise create "needless friction" between the enforcement of state and federal policies. *Louisiana P. & L. Co.* v. *Thibodaux City*, *supra*, at 33. See also *Harrison* v. *NAACP*, *supra*.

I agree that the present situation is within none of these categories, and that the District Court should therefore not have dismissed, but proceeded to judgment on the issues in the case.[2] In particular, I can find in this statute no room for a state construction which might obviate the need for a decision on the constitutional issue. If, however, the opinion of the Court is intended to suggest that the central, or even a principal, issue in deciding the propriety of abstention is whether the complaint has alleged "overbreadth," or only "vagueness," with respect to the New York statute in question, I cannot agree. My reasons are three. *First*, neither principle has ever been definitively delimited by this Court; a doctrine built upon their supposed differences would be likely to founder for lack of a foundation. See generally, Note, The Void-for-Vagueness Doctrine

[2] Unlike the Court, I obtain no assistance for this conclusion from the ubiquitous and slippery "chilling effect" doctrine. Appellant might have sought in the state courts the declaratory relief he now asks. N. Y. Civ. Prac. § 3001. Given the state courts' disposition of appellant's earlier prosecution, he can scarcely maintain that those courts would not promptly provide any relief to which he is entitled. Absent such allegations, it is difficult to see how that doctrine can have the slightest relevance. See *Dombrowski* v. *Pfister*, 380 U. S. 479, 499. In these circumstances, to apply the amorphous chilling effect doctrine would serve only to chill the interests sought to be maintained by abstention.

in the Supreme Court, 109 U. Pa. L. Rev. 67. *Second*, there is no reason to suppose that a case involving allegations of overbreadth would inevitably be inappropriate for abstention; the federal court might nonetheless reasonably consider that its exercise of jurisdiction would create "needless friction" with state officials, *Louisiana P. & L. Co.* v. *Thibodaux City*, *supra*, at 33; or it might reasonably conclude that a state court determination would present the federal issues "in a different posture." *Allegheny County* v. *Mashuda Co.*, *supra*, at 189. *Third*, such a standard might in effect reduce the abstention doctrine to a pleader's option; the fundamental interests served by the doctrine would be jettisoned whenever a complainant had sufficient foresight to insert into his pleading an allegation of overbreadth. I can see no proper alternative to a careful examination, in light of the interests served by abstention, of the circumstances of each case.

I agree with the Court, substantially for the reasons given in its opinion, that whether or not injunctive relief might ultimately prove appropriate in this instance is not a pertinent question at this stage of the matter.

I accordingly concur in the judgment of the Court, but in doing so wish to emphasize that, like the Court, I intimate no view whatever upon the merits of the constitutional challenge to this statute.